92-1396

No.

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

MORRIS INDUSTRIAL BUILDERS, INC., a New Jersey Corporation,

Petitioner,

vs.

THE TOWNSHIP OF SOUTH BRUNSWICK in the County of Middlesex, a municipal corporation of the State of New Jersey, THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF SOUTH BRUNSWICK, THE PLANNING BOARD OF THE TOWNSHIP OF SOUTH BRUNSWICK,

Respondents.

Petition for Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Due Process Clause of the Fourteenth Amendment as construed in *McKesson v. Division of Alcoholic Beverages,* 496 U.S. 18 (1990) entitle citizens to a "clear and certain remedy" for improper collection of money in violation of state, as well as federal, law?

2. Does *McKesson* apply only to taxes, or to any governmentcompelled payment of money?

3. Was petitioner real estate developer denied a "clear and certain remedy" for illegally collected development fees by the New Jersey appellate court's mistaken application of the choice-of-law factors of *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971)?

RULE 29.1 STATEMENT

There are no parent companies or subsidiaries of Morris Industrial Builders, Inc.

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OPINIONS BELOW

Frank A. Greek & Sons. Inc. v. The Township of South Brunswick, 257 N.J. Super. 94, 607 A.2d 1359 (App. Div. 1992), *certif. denied,* __ N.J. __, __ A.2d __ (1992) (1a, 18a).

STATEMENT OF JURISDICTION

Petitioner, Morris Industrial Builders, Inc., invokes the Court's jurisdiction to review the June 16, 1992 final judgment of the New Jersey Superior Court, Appellate Division, where petitioner's rights under the Fifth and Fourteenth Amendments to the United States Constitution were drawn into question (1a). *See* 28 U.S.C. § 1257(a). The New Jersey Supreme Court denied discretionary review of this judgment by order dated November 23, 1992 (00a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides:

> . . . Nor shall any person . . . be deprived of life, liberty or property, without due process of law; . . .

U.S. Const. Amend. 5.

The Fourteenth Amendment states:

> Section 1 . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; . . . .

U.S. Const. Amend. 14 § 1.

STATEMENT OF THE CASE

In *Southern Burlington County NAACP v. Mt. Laurel Township*, 67 N.J. 151, 336 A.2d 713, *cert. denied*, 423 U.S. 808 (1975) (*Mt. Laurel I*), the New Jersey Supreme Court held that developing municipalities were required by the New Jersey Constitution to provide a realistic opportunity for development of low-income and moderate-income housing. In *Southern Burlington County NAACP v. Mt. Laurel Township*, 92 N.J. 158, 456 A.2d 390 (1983) (*Mt. Laurel II*), the court went further and imposed an affirmative obligation on every municipality to provide its fair share of affordable housing. Some municipalities, including respondent Township of South Brunswick, attempted to finance their *Mt. Laurel II* obligation by requiring real estate developers to contribute to affordable-housing trust funds as a condition of securing land use approvals from local planning and zoning boards.

Petitioner is an industrial developer headquartered in Secaucus, New Jersey. Beginning in the 1970's, Morris and its affiliates appeared regularly before the South Brunswick Planning Board for approval to construct warehouse/office buildings in the industrial section of the Township. In response to *Mt. Laurel II*, the Township adopted an affordable-housing trust fund ordinance which imposed development fees on most commercial and residential development as a condition for site-plan or subdivision approval. The fees for non-residential developments depended on the type of project involved, ranging from twenty-five to fifty cents per square foot. From 1988 to 1990, $602,580.89 was deposited under protest with the Township's affordable-housing trust fund on six Morris projects.[1]

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1. There was no procedure available for challenging the validity of these fees before their exaction, except for commencement of expensive and protracted legal proceedings which would have delayed and, in some cases, terminated the projects.

Several builders' associations initiated suits in the New Jersey Superior Court challenging South Brunswick's ordinance and those of four other municipalities. The associations claimed that the ordinances were *ultra vires,* an invalid tax in violation of the New Jersey Constitution's uniform property taxation requirement, a taking without just compensation, and a denial of due process and equal protection in violation of the United States and New Jersey Constitutions.

In *Holmdel Builders Ass'n v. Township of Holmdel,* 121 N.J. 550, 583 A.2d 277 (1990), decided December 13, 1990, the New Jersey Supreme Court found these ordinances invalid, but not on constitutional grounds. The court held that municipalities could collect such fees only pursuant to uniform regulations of the New Jersey Council on Affordable Housing ("COAH"), a state agency entrusted with oversight of affordable housing development. Since that agency had never promulgated any regulations, the court found that the challenged ordinances "were not validly adopted[.]" 121 N.J. at 585. The court did not reach the constitutional issues raised, except to "observe that insofar as those contentions are addressed to the facial validity of the development-fee ordinances in these cases, they do not have merit." *Id.* at 581. The court then considered the New Jersey Builders Association's claim for a refund on behalf of its members and dismissed for lack of standing "without prejudice to the right of individual members to seek refunds in separate actions." *Id.* at 586.

On January 28, 1991, COAH disseminated to New Jersey municipalities a so-called "Administrative Order" announcing its intent to adopt the sort of regulations envisioned in *Holmdel,* and "ordering" that municipalities "may" in the meanwhile retain funds previously collected from developers like Morris.[2] On May

2. For several weeks following *Holmdel,* the Township refunded contributions to some builders voluntarily. A new political administration took control of the Township Committee in January and promptly reversed this position.

1991, Morris commenced an action in the New Jersey Superior Court seeking a refund of its contributions. The claim was consolidated with several others already pending against the Township.

On July 19, 1991, before COAH had proposed and adopted any regulations, the trial judge granted summary judgment to Morris and its fellow developers and ordered an immediate refund (25a-38a). The judge was satisfied he was implementing the obvious intention of the State Supreme Court in *Holmdel.* Respondents unsuccessfully attempted to persuade him to delay action until COAH could adopt regulations which might validate, retroactively, collection of the fees already in the Township's custody. The trial judge refused because COAH was unable to represent when such regulations would be adopted and, more importantly, because no such regulations could lawfully revive South Brunswick's ordinance in any case.

The Township and COAH appealed to the Appellate Division, New Jersey's intermediate appellate court, where the matter was consolidated for argument and decision with appeals from similar decisions in several other municipalities. On January 21, 1992, six months before the appeal was argued, COAH finally adopted regulations authorizing municipalities to adopt development-fee ordinances and to apply them retroactively to fees collected prior to the December 1990 *Holmdel* decision. Several builders filed a separate appeal with the Appellate Division from the adoption of these new regulations. Morris' application for leave to participate in that appeal was summarily denied.

On June 16, 1992, a three-judge panel of the Appellate Division unanimously held that the trial judge granted Morris summary judgment too hastily. *Frank A. Greek v. South Brunswick Tp.*, 257 N.J. Super. 94, 607 A.2d 1359 (App. Div. 1992), *certif. denied*, __ N.J. __, __ A.2d __ (1992) (1a, 18a). The court rejected the trial judge's conclusion that the State Supreme Court intended

for developers like Morris to receive refunds automatically:

> Undoubtedly, the Court recognized that the invalidation of the ordinances would not necessarily require a complete refund. In such matters, issues concerning the disruption of governmental policies and other equitable considerations determine whether a decision of this nature should be given prospective effect only, ... retroactive effect, ... or partial retroactive effect[.]

257 N.J. Super. at 103-104 (12a-13a). Without reaching the validity of the new regulations then the subject of a separate appeal, the panel held that COAH had the "potential power" to validate the prior levies, relying on caselaw upholding curative legislation to rectify imperfect exercises of government power. The matter was remanded to the trial judge with instructions to stay further action until the validity of the new regulations had been thoroughly tested.[3]

Morris petitioned the New Jersey Supreme Court for discretionary review of the Appellate Division's decision.[4] The petition argued that the Appellate Division confused retroactivity as a choice of law with the constitutional duty to provide the "clear and certain remedy" mandated by *Atchison T.& S.F.R. Co. v. O'Connor*, 223 U.S. 280, 285-286 (1912), recently reaffirmed in

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3. Petitioner's contributions have remained in an interest-bearing account in the Township's custody throughout this litigation.

4. Under New Jersey Court Rule 2:2-5(b), the Appellate Division's decision is considered a final judgment for purposes of review by the New Jersey Supreme Court, even though it remanded to the trial court for further proceedings.

McKesson v. Division of Alcoholic Beverages, 496 U.S. 18 (1990).The New Jersey Supreme Court summarily denied review on November 23, 1992 (18a).

REASONS FOR GRANTING THE WRIT

The Fifth Amendment to the Constitution of the United States provides:

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U.S. Const. Amend. 5.

The Fourteenth Amendment states:

> Section 1 . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; . . . .

U.S. Const. Amend. 14 § 1.

The procedural guarantees of the Fourteenth Amendment apply whenever the State removes or significantly alters property interests recognized and protected by state law. *Paul v. Davis,* 424 U.S. 693, 710-711 (1976). It is difficult to conceive of any definition of "property" that would not include one's own money. Citizens are "deprive[d]" of this property interest whenever Government requires them to part with their funds.

A loss of money may be compelled through judicial,

administrative or legislative action. The effect on the citizen's wallet is the same in each case, but the "process" that is "due" may differ. When it takes the form of a money judgment or fine in a judicial proceeding, the Court's precedents plainly require advance notice and a meaningful opportunity to be heard. *Mathews v. Eldridge*, 424 U.S. 319, 333-335 (1976). When a tenured government employee loses salary as a result of administrative action like suspension or termination of employment, due process requires "some kind of hearing". *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985).

The Due Process Clause applies to legislative action as well, although the entitlement to *individualized* consideration is less. In *Bi-Metallic Investment Co. v. State Board of Equalization of Colorado*, 239 U.S. 441 (1915), Justice Holmes wrote:

> Where a rule of conduct applies to more than a few people it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.

Id. at 445. More recently, in *United States v. Locke*, 471 U.S. 84, 108 (1985), Justice Marshall stated:

> In altering substantive rights through enactment of rules of general applicability, a legislature generally provides constitutionally

> adequate process simply by enacting the statute, publishing it, and, to the extent the statute regulates private conduct, affording those within the statute's reach a reasonable opportunity both to familiarize themselves with the general requirements imposed and to comply with those requirements.

See also Logan v. Zimmerman Brush Co., 455 U.S. 422, 433 (1982) ("... [T]he legislative determination provides all the process that is due[.]"). When property rights are disturbed by a legislative body without appropriate enabling authority or compliance with prescribed legislative procedures, however, the Fourteenth Amendment is still offended. That is what happened here.

Most of the cases reaching this Court involving due process and the payment of money have involved taxation. The Court in *McKesson v. Division of Alcoholic Beverages,* reaffirmed the principles stated by Justice Holmes in *Atchison T.& S.F.R. Co. v. O'Connor:*

> It is reasonable that a man who denies the legality of a tax should have a clear and certain remedy. The rule being established that apart from special circumstances he cannot interfere by injunction with the State's collection of its revenues, an action at law to recover back what he has paid is the alternative left. Of course we are speaking of those cases where the State is not put to an action if the citizen refuses to pay. In these latter he can interpose his objections by way of defence, but when, as is common, the State has a more summary remedy, such as distress, and the party indicates by protest that

> he is yielding to what he cannot prevent, courts sometimes perhaps have been a little too slow to recognize the implied duress under which payment is made. But even if the State is driven to an action, if at the same time the citizen is put at a serious disadvantage in the assertion of his legal, in this case of his constitutional, rights, by defence in the suit, justice may require that he should be at liberty to avoid those disadvantages by paying promptly and bringing suit on his side.

283 U.S. at 285-286, quoted in *McKesson, supra,* 496 U.S. at 32-33.

In *Carpenter v. Shaw,* 280 U.S. 363 (1930), the Court held that "a denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment." *Id.* at 369. In *Montana Nat'l Bank v. Yellowstone County,* 276 U.S. 499 (1928), the Court stated: "[A taxpayer] cannot be deprived of its legal right to recover the amount of tax[es] unlawfully exacted of it by [a] later decision which, while repudiating the construction under which the unlawful exaction was made, leaves them thus exacted in the public treasury." 276 U.S. at 504-505.

The federal right to retroactive relief is not limited to unconstitutional taxation. In *Owen v. City of Independence,* 445 U.S. 622 (1980), for example, the Court held that a city is not entitled to immunity from damage claims in an action under 42 U.S.C. § 1983. The Court reached that result in large part because it was consonant with general remedial principles: "[A] damages remedy against the offending party is a vital component" of any remedial scheme (445 U.S. at 651). The Court added that "[i]t hardly seems unjust to require a municipal defendant which has

violated a citizen's constitutional rights to compensate him for the injuries suffered thereby. . . . Elemental notions of fairness dictate that one who causes a loss should bear that loss." *Id.* at 654; *see also Bivens v. Six Unknown Named Agents,* 403 U.S. 388, 396 (1971); *id.* at 407-409 (Harlan, J., conc.).

The Court concluded in *Owen* that these remedial considerations apply with particular force when the violation stems from official government policy. "[T]he importance of assuring [the] efficacy [of a scheme for vindicating constitutional rights] is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed." 445 U.S. at 651. In this situation especially, "it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all the taxpayers, than to allow its impact to be felt solely by those whose rights . . . have been violated." *Id.* at 655. *See also Ward v. Board of County Commissioners,* 253 U.S. 17, 24 (1920) ("[t]o say that the county could collect these unlawful taxes by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate the property of these [taxpayers] arbitrarily and without due process of law"); and *District of Columbia v. Thompson,* 281 U.S. 25, 31 (1930) (citing *Ward* for the principle that government must make restitution of funds held "in its treasury . . . which it has no right in equity, good conscience, or common honesty to retain").

There are striking parallels between the tax refund cases and others where there is a governmental taking of private property requiring payment of just compensation. *See Ward,* 253 U.S. at 24 (characterizing the county's refusal to provide refunds as a "tak[ing]" of the taxpayers' property). In both circumstances, the individual is deprived of ownership or use of property under the compulsion of government authority, but, upon judicial examination, the government is held to have no right to act as it did.

In the takings situation, the government must either discontinue its conduct or pay just compensation for the full value of the property. Whichever course it chooses, it must return to the property owner the value of the property taken prior to the judicial determination. *First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304 (1987). The analysis here is informed by the Framers' conclusion — embodied in the Takings Clause — that government is not entitled simply to restore the property to its owner for future use. Instead, it must make restitution (in the form of just compensation) for the value taken prior to restoration of the property. In the context of taxes and fees, government should have a comparable obligation not only to stop, but to restore the aggrieved party to the position it would have enjoyed but for the unlawful exaction.

These rights are triggered whenever a court makes "fully retroactive" a decision invalidating a tax or fee. "Full retroactivity" means application of a holding "both to the parties before the court and to all others by and against whom claims may be pressed. . . ." *James B. Beam Distilling Co. v. Georgia,* 501 U.S. __, __ (1991). A court's determination to apply a rule of law "forward" or "backward" is governed by reliance interests and other equitable considerations reflected in the three-factor test of *Chevron Oil Co. v. Huson,* 404 U.S. 97, 106-107 (1971).[5] Once the decision is made to apply a rule of law "backward", however, "*McKesson* establishes that equitable considerations play only the most limited role in delineating the scope of that relief." *American Trucking Assns. v. Smith,* 496 U.S. 167, 181 (1990).

Holmdel was "fully retroactive". The court explicitly found

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5. The New Jersey courts apply the *Chevron* test to determine the retrospective effect of their rulings whether the substantive rights in question arise under federal or state law. *See Crespo v. Stapf,* 128 N.J. 351, 365-66, 608 A.2d 241 (1992).

that the ordinances before it had not been adopted lawfully, and "set [them] aside . . . without prejudice to the right of individual [developers] to seek refunds in separate actions." 121 N.J. at 586. Even if the court did not intend that refunds automatically flow, as the Appellate Division later held, Morris was still entitled to *some* form of prompt, meaningful relief.

Under *McKesson*, the Due Process Clause requires that the remedy rectify the legal flaw which invalidated the exaction in the first place. Where an otherwise lawful tax is struck down as discriminatory, the legal infirmity stems not from deprivation of the taxpayer's money *per se*, but from failure to treat similarly situated parties equitably. The appropriate remedy in that case might be equalization of the burden, rather than a complete refund. Discrimination was not what invalidated the development fees in this case.

The ordinance here was set aside for lack of uniform enabling regulations. As the New Jersey Supreme Court saw it, COAH would not merely rubberstamp the ordinances already in place, but would develop from scratch a statewide framework for exaction of such fees, informed by practical insights and policy concerns developed in the administrative rule-making process:

> . . . [W]e determine that COAH, through its rulemaking procedures, should specify standards for development fees, so that municipalities may consider employing such fees as inclusionary-zoning devices in designing their housing elements under the [New Jersey Fair Housing Act]. Regulatory standards will enable us to determine that persons subject to such ordinances have been reasonably informed of their obligations, and that both municipalities and COAH in the

> adoption and approval of such ordinances are acting in conformity with the legislative intent of the [Fair Housing Act].
>
> Such regulations will define more precisely the impact and effect of development fees. They presumably will address the types of developments that will be subject to fees, the amount and nature of the fees imposed, the relationship of fees to other inclusionary-zoning measures such as mandatory set-asides and density bonuses, the conditions for the creation and administration of affordable-housing trust funds, the requirements for the use and application of such funds, and whether a system of development fees should include counterbalancing density bonuses. . . . Because we cannot and should not prognosticate what scheme COAH will devise for non-residential development fees, we do not determine on the present record whether development fees without bonuses might or might not in a particular application be constitutionally objectionable.
>
> COAH, in the exercise of sound administrative discretion, should consider the desirability and feasibility of such development fees in the broader context of the State's affordable housing policy.

Holmdel, 121 N.J. at 579-80.

Adherence to prescribed legislative procedure is required by the Due Process Clause before a police power regulation can

require citizens to pay money. The court plainly had in mind more than curative legislation to correct a technical defect in South Brunswick's ordinance.[6]

Respondents may argue that *McKesson* is limited to taxes in the strict sense and, even then, only when collected in violation of federal, not just state, law. We do not read that decision so narrowly, and can conceive of no legal or policy reasons why the Court's holding should be so narrowly construed. The few lower courts addressing the issue agree. In *Smith v. Travis County Educ. Dist.*, 791 F. Supp. 1170 (W.D. Tex. 1992), also a tax case, District Judge Nowlin reached the same conclusion:

> In *McKesson*, the Supreme Court in no way limited its holding to state taxes that are only in violation of the United States Constitution. The Due Process Clause applies to any unlawful collection of taxes. [Footnote omitted.]

Id. at 1178. Earlier in his opinion, he highlighted an excerpt from

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6. The New Jersey courts have long sanctioned retroactive ratification of technically defective exercises of government power. The "curative act" doctrine originated in the context of ratifying contracts, *Houman v. Mayor & Coun. Bor. Pompton Lakes*, 155 N.J. Super. 129, 160, 382 A.2d 413 (Law Div. 1977), and was later extended to other government actions. *Houman* (decision to proceed with tax appeal); *Ferreira v. City of Asbury Park*, 237 N.J. Super. 142, 567 A.2d 230, *certif. denied*, 121 N.J. 627, 583 A.2d 324 (1990) (ratification of land use ordinance without prior reference to planning board); *Edgewater Park v. Edgewater Park Housing Auth.*, 187 N.J. Super. 588, 602, 455 A.2d 575 (Law Div. 1980) (employment of legal counsel). Curative legislation has been limited to procedural or technical irregularities not affecting the substance of the action. *State, of Vreeland et al., pros. v. Town of Bergen*, 34 N.J. Eq. 438 (Sup. Ct. 1871). When the irregularity is likely to affect the substance of the action, such legislation has been rejected. *Groel v. Newark*, 78 N.J.L. 142, 73 A. 522 (Sup. Ct. 1909).

Justice Holmes' opinion in *O'Connor* implying that due process attaches whenever the State collects money in violation of any "legal . . . rights". *O'Connor*, 223 U.S. at 285-286, quoted at 791 F. Supp. at 1177, n.3. *See also O'Connell Management Co. v. Massuchesetts Port Authority*, 744 F. Supp. 368, 378, n. 13 (D. Mass. 1990), applying *McKesson* to all government-compelled fees.

The thrust of *McKesson* is that an aggrieved party is entitled to be restored to the same position he would have occupied if a meaningful predeprivation challenge had been available. Morris has been denied this right for over two years, in a setting rife with well-intentioned abuse of government authority. For the seven month period between the *Holmdel* decision and argument of Morris' summary judgment motion, South Brunswick retained the improperly collected development fees under the aegis of an "Administrative Order" from COAH without a scintilla of legal authority.[7] The trial judge was disturbed at the prospect of leaving the developers twisting in the wind indefinitely, even if the agency had the power to adopt retroactive regulations:

> THE COURT: Ms. Callahan, before you begin your argument perhaps you can help me on a couple of questions I might have. As I understand it from your position, the Council is currently considering forms of regulations which they now intend to adopt sometime in the future. Is that right?
>
> MS. CALLAHAN: Yes, Your Honor.

---

7. It was not really an "order" at all — at least not in the sense of a compulsory directive. It "ordered" that municipalities "may" retain the monies until COAH adopts statewide regulations and the municipalities, in turn, promulgate ordinances conforming to their requirements. *See* further discussion by the trial judge at 30a-32a.

THE COURT: Okay. And I'm a little fuzzy on my administrative law but if I understand correctly I'm asking you now, first you reach tentative drafts of regulations. Correct?

MS. CALLAHAN: Yes, Your Honor. If you'd like, I could give you a little summary of how the rule —

THE COURT: And then from there you advertise and have hearings published?

MS. CALLAHAN: Correct. You don't necessarily have to have hearings. You allow the opportunity for comment.

THE COURT: Comment. Okay.

MS. CALLAHAN: And generally that is written -

THE COURT: And that is a formal adoptive process?

MS. CALLAHAN: Yes.

THE COURT: Okay. And I suppose they've been doing this since January or at least since the *Holmdel* case was decided?

MS. CALLAHAN: Yes, Your Honor.

THE COURT: When would you anticipate the Council would have these adopted regulations?

MS. CALLAHAN: Filing in place, I would guess December and —

THE COURT: Would you bet me, would you be willing to pay all your co-counsel for lunch? There's a restaurant here called La Fontana. It's very expensive.

MS. CALLAHAN: I know that one.

THE COURT: Would you be willing to buy lunch for everybody if these aren't formally adopted by December?

MS. CALLAHAN: Almost, Your Honor.

THE COURT: Out of your own pocket?

MS. CALLAHAN: Almost, because —

THE COURT: Almost?

MS. CALLAHAN: I say almost because I'm fairly certain that they will be done by then because, number one, the Council already had proposed regulations, orders in June. They did not formally propose them in the New Jersey register because some policy issues needed to be ironed out, so they anticipate to have all that ironed out for the proposal to go in the register for August or September. Then there's also a thirty day comment period. Then after that the agency can adopt the regulations.

* * *

THE COURT: . . . I was just discussing timing and what happens when the municipalities that wish to voluntarily become part of this have to adopt ordinances, do they not?

MS. CALLAHAN: Yes, Your Honor.

THE COURT: Okay. And we all know how fast municipalities move, do their drafting, so I would guess that if everything went as quick as you think it might, somewhere in the summer of 1992 South Brunswick might have an ordinance in place that could then be — properly be challenged.

MS. CALLAHAN: I would hope it would be before then.

THE COURT: I know you would hope.

MS. CALLAHAN: I cannot guess as to what would happen.

THE COURT: Okay. And of course you would agree, given the issues that are involved in the legal history, that no matter what happens there certainly would be a challenge in the Court, both to the ordinance and to the regulations again.

MS. CALLAHAN: Yes, Your Honor.

THE COURT: Which probably would not be resolved until the Supreme Court resolution two years after that. So we'd be talking about

> holding on to this money somewhere until 1994, 1995 until the resolution of the issue.
>
> MS. CALLAHAN: Your Honor, the money is being held in a separate interest bearing account.
>
> THE COURT: I understand that. That wasn't my question, Counsel. We can reasonably predict under your scenario at least another four years before these people even will have an opportunity under your suggestion to get their money back, if in fact they are entitled to it.
>
> MS. CALLAHAN: Your Honor, I am not willing to predict how long it will take.

(20a-24a).

At the conclusion of the argument, the judge ruled:

> . . . [T]here is no clear schedule [for adopting regulations by COAH]. There are some fond hopes that it will be done sometime by the end of this year and that perhaps all the public bodies will act in appropriate fashion sometime by the middle of next year or perhaps a little later, which would only then for the first time, following COAH's argument, would permit the plaintiffs here to challenge the sufficiency of those ordinances and regulations in an attempt to get back the money that was concededly paid pursuant to an invalid, whether you call it an invalidly adopted or

invalid in general, an ordinance which had no legal effect and under which constitutionally is the only way a public entity, whether it be a legislature or a municipality or a county can exact from private persons monies.

There's only certain ways in a republican or democratic society — I use those with the small letters — that governments may extract from its citizens money. That indeed is that which separates us from other forms of government.

And it is not, as I've ever understood it, in our Constitutional process permitted that monies may be held or obtained by a simple letter of an appointed public official. It frankly staggers the mind.

(31a).

* * *

I really don't understand and I rule here as a matter of law that any regulation, even one validly adopted *in futuro* and validly adopted by the municipality, would constitute an *ex post facto* rule or regulation, and you cannot now resuscitate that which was exacted illegally in the first place. Hiding the gun after the robbery doesn't make it legal.

(35a).

On appeal, the Appellate Division held that it was premature to consider a remedy for petitioner until COAH developed regulations, determined whether to apply them retroactively and had them tested in the courts. The sole authority relied on was the New Jersey Supreme Court's formulation of the *Chevron* retroactivity doctrine. 257 N.J. Super. at 103-104, citing *Salorio v. Glaser*, 93 N.J. 447, 465-67, 461 A.2d 1100, *cert. denied*, 464 U.S. 993 (1983) (12a-13a). This was plainly wrong since the New Jersey Supreme Court's decision in *Holmdel* was retroactive. From that point forward, petitioner was entitled under *McKesson* to a "clear and certain remedy". The trial judge's determination to award a refund certainly met the Court's minimum constitutional standard. The Appellate Division's treatment of the question did not.

CONCLUSION

The Court should grant certiorari to review the Appellate Division's erroneous judgment.

Respectfully submitted,

DAVID B. RUBIN
Counsel of Record
Rubin, Rubin, Malgran, Kaplan & Kuhn
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APPENDIX A — OPINION OF NEW JERSEY SUPERIOR COURT, APPELLATE DIVISION, FILED JUNE 16, 1992

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-6073-90T3
A-6080-90T3
A-205-91T3
A-206-91T3
A-394-91T3
A-429-91T3

FRANK A. GREEK & SONS, INC., DKM PROPERTIES CORPORATION, RICHARD V. NELSON, I. HELLER CONSTRUCTION COMPANY, INC. AND M. ALFIERI COMPANY, INC.,

Plaintiffs-Respondents,

v.

THE TOWNSHIP OF SOUTH BRUNSWICK in the County of Middlesex, the TOWNSHIP COMMITTEE OF SOUTH BRUNSWICK and the PLANNING BOARD OF THE TOWNSHIP OF SOUTH BRUNSWICK OF ADJUSTMENT,

Defendants-Appellants.

TIMBER PONDS, INC.,

Plaintiff-Respondent,

v.

Appendix A

TOWNSHIP OF SOUTH BRUNSWICK, in the County of Middlesex, the TOWNSHIP COMMITTEE OF SOUTH BRUNSWICK and the PLANNING BOARD OF THE TOWNSHIP OF SOUTH BRUNSWICK BOARD OF ADJUSTMENT,

Defendants-Respondents.

MORRIS INDUSTRIAL BUILDERS, INC.,

Plaintiff-Respondent,

v.

TOWNSHIP OF SOUTH BRUNSWICK, in the County of Middlesex, a municipal corporation of the State of New Jersey, THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF SOUTH BRUNSWICK, THE PLANNING BOARD OF THE TOWNSHIP OF SOUTH BRUNSWICK,

Defendants-Appellants.

FRANK DIMISA, d/b/a FOX RUN II, and McCAMPBELL DEVELOPMENT, INC., a New Jersey Corporation,

Respondents,

v

THE TOWNSHIP OF HOLMDEL, in the County of Monmouth, THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF HOLMDEL and THE PLANNING BOARD OF THE TOWNSHIP OF HOLMDEL,

Appellants.

Appendix A

EUGENE J. LONG,

Respondent,

v.

THE TOWNSHIP OF CHESTER, in the County of Morris, a municipal corporation of the State of New Jersey, and the MAYOR AND TOWNSHIP COUNCIL OF THE TOWNSHIP OF CHESTER,

Defendants.

CHESTERFIELD FARMS, DIRAJE CORPORATION, CHESTNUT RUN LIMITED PARTNERSHIP, CUSTOM LIVING HOMES, INC., TWIN BROOKS LIMITED PARTNERSHIP, ARTHUR N. FURHMAN, KENDALL WOODS LIMITED PARTNERSHIP and KENDALL CONSTRUCTION CORPORATION,

Plaintiffs,

v.

THE TOWNSHIP OF CHESTER in the COUNTY OF MORRIS, a municipal corporation of THE STATE OF NEW JERSEY and THE MAYOR AND TOWNSHIP COUNCIL OF THE TOWNSHIP OF CHESTER,

Defendants.

REALTY TRANSFER COMPANY LIQUIDATING TRUST,

Plaintiff,

v.

Appendix A

TOWNSHIP OF CHESTER, COUNTY OF MORRIS, a municipal corporation of THE STATE OF NEW JERSEY and THE TOWNSHIP COUNCIL OF THE TOWNSHIP OF CHESTER,

Defendants.

CHERRY HILL PROPERTIES CORPORATION,

Respondent,

v.

THE TOWNSHIP OF CHERRY HILL in the County of Camden, a Municipal Corporation of the State of New Jersey, and THE TOWNSHIP COUNCIL OF THE TOWNSHIP OF CHERRY HILL,

Appellants,

and

COUNCIL ON AFFORDABLE HOUSING (COAH),

Intervenor-Appellant.

Argued March 30, 1992 - Decided June 16, 1992

Before Judges Bilder, Stern and Keefe.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County (A6073-90T3; A-6080-90T3) Monmouth County (A205-91T3) Morris County (A-206-91T3), Camden County (A-394-91T3; A-429-91T3).

Appendix A

Geraldine Callahan, Deputy Attorney General, argued the cause for appellant Council on Affordable Housing (Robert J. Del Tufo, Attorney General of New Jersey, attorney; Joseph L. Yannotti, Assistant Attorney General, of counsel; Ms. Callahan, on the brief).

Edward L. Picone argued the cause for appellant Township of South Brunswick (Lawrence W. Saltzman, on the brief).

Francine I. Axelrad argued the cause for appellants, The Township of Cherry Hill and the Township Council of the Township of Cherry Hill.

Thomas F. Carroll, III argued the cause for respondents, Frank A. Greek & Sons, Inc., DKM Properties Corporation, Richard V. Nelson, I. Heller Construction Company, Inc., M. Alfieri Company, Inc., Timber Ponds, Inc., Frank DiMisa d/b/a Fox Run II, McCampbell Development, Inc., Eugene J. Long, Chesterfield Farms, Diraje Corporation, Chestnut Run Limited Partnership, Custom Living Homes, Inc., Twin Brooks Limited Partnership, Author N. Furhman, Kendall Woods Limited Partnership and Kendall Construction Corporation (Hill Wallack, attorneys).

David B. Rubin argued the cause for respondent, Morris Industrial Builders, Inc. (Rubin, Rubin, Malgran & Kuhn, attorneys).

Eugene Iadanza argued the cause for respondent, Township of Holmdel and the Township Committee of the Township of Holmdel (Tucci, Iadanza & Reisner, attorneys).

Gary T. Hall argued the cause for respondents, Township of Chester and the Mayor and Township Council of the Township of Chester (McCarter & English, attorneys).

Appendix A

Jeffrey Kantowitz argued the cause for respondents, Realty Transfer Company Liquidating Trust and Cherry Hill Properties Corporation (Greenbaum, Rowe, Smith, Ravin & Davis, attorneys; Mr. Kantowitz, of counsel; Deirdre Moore, on the brief).

The opinion of the court was delivered by KEEFE, J.A.D.

After the Supreme Court issued its decision on December 13, 1990, in *Holmdel Builders Ass'n v. Township of Holmdel*, 121 *N.J.* 550 (1990), the Council On Affordable Housing (COAH) issued an "Administrative Order" (AO) on January 28, 1991, announcing its intention to adopt regulations with respect to mandatory development fees designed to establish "standards and criteria for such ordinances" and "how fees collected prior to the *Holmdel* decision are to be handled." The AO also provided that municipalities which had collected such fees prior to the *Holmdel* decision could retain the fees in a separate, interest bearing account "provided that the municipality adopts and submits to COAH a duly adopted resolution of the municipal governing body expressing its intent to submit its ordinance to COAH immediately upon COAH promulgation of comprehensive regulations that set standards for such ordinance." About the same time or shortly thereafter, plaintiff developers and builders in these consolidated matters[1] either reactivated suits that had been previously stayed or instituted actions against the defendant municipalities to recover fees paid by plaintiffs under the municipalities' invalidated development fee ordinances. In each case, the defendant municipality relied upon the AO as a defense. COAH was permitted to intervene in each case and either moved for a stay of the proceedings pending promulgation of the regulations or a transfer to the Appellate Division, contending that any challenge to the validity of the AO must be heard in this court. Plaintiffs and defendant municipalities cross-moved for summary judgment.

Appendix A

On June 14, 1991, the Law Division judge in the matters involving the Township of Chester denied COAH's motion to transfer to the Appellate Division, holding that the provisions of *R.* 2:2-3(a)(2) were not applicable to these circumstances. He concluded that "the Supreme Court has decided that the ordinances are invalid and that the fees collected pursuant to those ordinances were invalidly collected and they go back to either developer or some derivative person appropriately thereunto authorized." He further decided that there was no way in which COAH could adopt a regulation or regulations which could result in the "resuscitation of these invalidly adopted ordinances."

However, the judge stopped short of granting summary judgment to the plaintiffs finding that "there still are open questions about who gets the money." Finally, he directed the parties to attempt to enter into a stipulation concerning terms for the refund. When he later learned that such a stipulation could not be agreed upon, he scheduled an evidentiary hearing to determine the amount owed to the individual plaintiffs. We granted COAH's motion for leave to appeal that interlocutory order and stayed the trial court proceedings pending appeal.

On July 15, 1991, the trial judge in the matter involving the Township of Holmdel addressed motions similar to those presented in the Township of Chester cases. He understood the Supreme Court's decision in *Holmdel* to say that the individual builders were entitled to start their own actions for a return of the money but did not interpret the decision to hold that the builders were entitled to a return of the monies as a matter of law and

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1. This court initially denied a motion to consolidate these matters but ordered that they be scheduled back-to-back for oral argument. Further consideration satisfies us that there are common issues which permit consolidation for the purpose of this opinion.

without the development of a full record. He considered the AO to be advisory and denied COAH's motion to transfer the matter to the Appellate Division and/or stay the proceedings pending decision on COAH's motion to obtain leave to appeal in the Township of Chester case. Instead, he elected to press forward with the litigation and scheduled a pretrial conference. We granted COAH's motion for leave to appeal and stayed the trial court proceedings pending appeal.

On July 30, 1991, the trial judge in the matters involving the Township of South Brunswick entertained motions involving arguments similar to those presented in the Chester and Holmdel matters. He denied COAH's motion to stay the cases and/or transfer them to the Appellate Division finding that the AO did not rise to the level of rule-making or *quasi*-judicial action. He further found "as a matter of law that any regulation, even one validly adopted *in futuro* and validly adopted by the municipality, would constitute an *ex post facto* rule or regulation, and you cannot now resuscitate that which was exacted illegally in the first place." Thus, he entered summary judgment in favor of the plaintiffs in those cases and ordered that the monies on deposit with the Township be returned to them. COAH and the Township of South Brunswick filed separate notices of appeal from this final judgment. Thereafter, we entered a stay pending appeal.[2]

Finally, on August 2, 1991, the trial judge in the matter involving the Township of Cherry Hill also denied COAH's motion for a stay and/or transfer to the Appellate Division. He concluded that no deference should be given to the AO and entered summary judgment in favor of plaintiffs ordering a return of the

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2. The order granting the stay permitted plaintiffs to obtain the money on condition that a bond or letter of credit is posted with the Clerk of the Superior Court.

money with interest. He also determined that the Cherry Hill ordinance was invalid because the Township Council substantially altered it by passing a resolution after the first reading increasing the fee from one percent to three percent without notification to the public. However, he stayed the order pending appeal. Cherry Hill and COAH filed separate notices of appeal.[3]

On appeal, COAH contends that in each case the validity of its AO was directly at issue and, for that reason, the trial judges erred in failing to transfer the cases to the Appellate Division for determination. COAH contends further that the AO was a reasonable exercise of its statutory authority under the Fair Housing Act (FHA), that it has the power to adopt regulations providing procedures to validate the invalidly adopted ordinances, and that the announcement of its intention to adopt such regulations is not *prima facie* invalid and should have been honored. The municipalities have essentially adopted the same position as COAH. However, in the Cherry Hill matter the municipality also contends that the trial judge erred in determining that the Cherry Hill ordinance was procedurally invalid.

We need not address the issue of whether the trial judges erred in denying COAH's motion to transfer that portion of the litigation before them challenging COAH's authority to issue the AO, nor need we decide whether the AO was a valid exercise of COAH's power. As we see it, those issues are simply ancillary to the primary issue which undergirds each of the orders under review, save perhaps the order stemming from the Holmdel matter. The principle issue to be decided is whether COAH has the potential

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3. COAH's motion to expedite all appeals was granted.

power[4] to promulgate regulations upon which the defendant municipalities may rely to validate prior action on their part in collecting the mandatory builders' fees. For the reasons stated herein, we conclude that COAH has such power and that there is sufficient general authority permitting municipalities to validate prior conduct. In light of this conclusion, we further hold that the trial judges should have deferred action for a reasonable period of time pending completion of the administrative process. Thus, whether the AO was validly promulgated and binding or whether it was simply advisory is of no moment. The matters should have been stayed pending COAH's proposed action whereupon the rights of the parties could be more clearly evaluated.

We begin our analysis by stating our understanding of what the Supreme Court in *Holmdel* decided and what it did not decide. Importantly, the Court held that "development fees are the functional equivalent of mandatory set-asides; and it is fair and reasonable to impose such fee requirements on private developers when they possess, enjoy, and consume land, which constitutes the primary resource for housing. Such measures do not offend the zoning laws or the police powers." *Holmdel, supra,* 121 *N.J.* at 573 (citation omitted). Not only did the Court determine that such fees are authorized by the Municipal Land Use Law (MLUL) and general police power, but it held that such fees were authorized by the FHA which

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4. We use the phrase "potential power" because the AO advises the reader of COAH's intent to promulgate regulations enabling municipalities to validate prior conduct under certain circumstances. We are now aware that COAH has promulgated such regulations and that there is an appeal pending which challenges them. We have specifically declined to address the particular regulations because the appeal was not perfected by the time these matters were heard.

> confers on a municipality a broad range of general powers, including the authority "to provide for its fair share of low and moderate income housing by means of any technique or combination of techniques which provide a realistic opportunity for the provision of [its] fair share." [*Id.* (citation omitted).]
>
> * * *
>
> Mandatory development fees that do not violate COAH requirements and otherwise meet standards of reasonableness are not inconsistent with the FHA. They may be fairly regarded as "other techniques proposed by the municipality." [*Id.* at 574 (citation omitted).]

However, the Court specifically declined to "determine the validity of uncompensated fees as applied by the municipalities in the cases now before us" perhaps because it remained to COAH "in the first instance to develop a comprehensive system of development fees." *Id.* at 576. The Court then found that COAH's exercise of rule-making authority in this area was "incomplete" because it had not specifically addressed mandatory development fees. Although finding that rule-making was necessary, the opinion recognized that COAH had taken action in these cases suggesting "an understanding that these measures are not invalid or *ultra vires.*" *Id.* at 579. The Court noted that COAH approved each of the municipality's housing plans which had included the builders' fee ordinances in question but failed to pass specifically on them finding that they were "'not required to implement the fair share plan.' " *Id.* at 579.

In essence, the Supreme Court found that COAH imperfectly exercised its jurisdiction because "the development-fee ordinances were subject to review and certification by COAH as a constituent part of the housing-element plan of the respective municipalities." *Id.* The Court then suggested that 1) COAH adopt regulations on the subject for the purpose of enabling courts "to determine that persons subject to such ordinances have been reasonably informed of their obligations," *id.*, and 2) "both municipalities and COAH in the adoption and approval of such ordinances are acting in conformity with the legislative intent of the FHA." *Id.* at 579-80. Consequently, in the absence of regulations the Court felt "constrained" to set aside the ordinances, *id.* at 580, because they were "not validly adopted." *Id.* at 585.

Lastly, the Court affirmed the Appellate Division's ruling that the New Jersey Builders Association lacked standing in the Chester Township matter to assert damage claims on behalf of its members. However, it acknowledged that the dismissal of the damage claim was "without prejudice to the right of individual members to *seek* refunds in separate actions." *Id.* at 586 (emphasis added). Thus, we agree with the trial judge in the Holmdel case, that the Supreme Court did not mandate that the money be refunded to the builders and developers as a matter of course. The words used by the Court were that individual members would have an opportunity to "seek" such refunds. *Id.*

Undoubtedly, the Court recognized that the invalidation of the ordinances would not necessarily require a complete refund. In such matters, issues concerning the disruption of governmental policies and other equitable considerations determine whether a decision of this nature should be given prospective effect only, *see Salorio v. Glaser*, 93 *N.J.* 447, 465-67, *cert. denied*, 464 U.S. 993, 78 L. Ed.2d 682 (1983); *Borough of Neptune City v. Borough of*

Avon-by-the-Sea, 61 *N.J.* 296, 310-11 (1972), retroactive effect, *see New Jersey Builders Ass'n v. Bernards Tp.*, 108 *N.J.* 223, 238 (1987); *Mill Race v. Mayor of Bernards Tp.*, 230 *N.J. Super.* 160, 167 (App. Div. 1989), or partial retroactive effect, *see Automatic Merchandising Council v. Township of Edison*, 102 *N.J.* 125, 131-132 (1986); *In re Fees of State Bd. of Dentistry*, 84 *N.J.* 582, 589 (1980). Although the records before the trial judges in the Chester cases and the Holmdel case are not complete, we assume that the trial judges in those cases recognized the relevancy of such issues, at least in part, and thus declined to enter full summary judgment in favor of plaintiffs. Thus, standing alone, considerations of such issues requiring as they do the development of a full record would be sufficient to reverse the summary judgments entered in the South Brunswick and Cherry Hill cases which were final.

More importantly, however, the Supreme Court did not decide whether COAH could promulgate regulations having the effect of validating prior municipal action. Indeed, it had no occasion to do so since COAH was not a party to that litigation and had not declared its intent to promulgate such regulations prior to the decision. Each of the trial judges, with the exception of the trial judge in the Holmdel case, found that COAH could not possibly act so as to permit validation of the subject ordinances. We disagree with their conclusion. It is important to reiterate that the ordinances in question were authorized by statute, *i.e.*, the MLUL, the general police power, and the FHA. Thus, they were not *ultra vires* acts by the municipalities. The distinction is important.

It is elemental "that if a municipal body or agency has the power to act, but has failed to follow exactly the proper procedures to exercise that power, its irregular, but not *ultra vires*, action may be subsequently ratified." *Ferreira v. City of Asbury Park*, 237 *N.J. Super.* 142, 162 (App. Div. 1989). Here, the municipalities were statutorily authorized to act. However, the Supreme Court was

unable to determine the validity of the uncompensated fees "as applied," *Holmdel, supra*, 121 *N.J.* at 576, because it could not compare the ordinances against "[r]egulatory standards" to ascertain whether they were in conformity with legislative intent as interpreted by COAH. *Id.* at 579-80.

Unlike the usual case in which a municipality may correct its prior invalid act, validation of the prior invalid acts in this case is dependent on COAH's administrative rule-making. In the context of this case, it is readily apparent that such administrative rule-making is legislative in nature. *Shapiro v. Essex Cty. Bd. of Chosen Freeholders*, 177 *N.J. Super.* 87, 95 (Law Div. 1980), *aff'd*, 183 *N.J. Super.* 24 (App. Div.), *aff'd*, 91 *N.J.* 430 (1982). COAH's AO expressed its intent to promulgate regulations having the effect of curing prior, imperfectly executed ordinances. In a general sense, legislative action can be specifically designed to enable a municipality to validate prior conduct. Such action is considered curative, thus permitting retrospective validation even where the initial municipal action may have been considered void. *See Edwards v. Mayor of the Bor. of Moonachie*, 3 *N.J.* 17, 21 (1949). If the Legislature can promulgate curative legislation having the effect of validating municipal conduct which at its inception was void, *id.*, we see no reason why an administrative agency cannot by properly exercising its rule-making authority cure municipal action which was not void *ab initio*.

While legislation and regulations are generally applied prospectively, *Gibbons v. Gibbons*, 86 *N.J.* 515, 521 (1981); *In re Appeal of Adoption of N.J.A.C. 7:7A-1.4*, 118 *N.J.* 552 (1990), *rev'd on dissent*, 240 *N.J. Super.* 224, 239 (App. Div. 1989), there are recognized exceptions to the general rule. *Gibbons, supra*, 86 *N.J.* at 522; *see Carnegie Bank v. Shalleck*, — *N.J. Super.* — (App. Div. 1992). A statute or regulation can be applied retrospectively where 1) the legislative body has expressed the intent to do so, 2)

the legislation is ameliorative or curative, 3) the expectations of the parties warrant retroactive application, and 4) manifest injustice to the adversely affected party does not result. *Gibbons, supra,* 86 *N.J.* at 522-23. The AO on its face expresses COAH's intent to pass regulations that are curative with the express intent to allow municipalities to retroactively validate prior conduct. We cannot pass on the merits of the third or fourth elements of the test without a more complete record.

We reiterate that we are now deciding only the question of whether COAH has the potential power to pass curative regulations and whether the municipalities have the potential power to validate prior ordinances that were not *ultra vires* their power to enact. We do not pass upon the regulations as promulgated or municipal conduct taken in response thereto. It is necessary only to point out that the decisions of the trial judges in the Chester, South Brunswick and Cherry Hill cases on this point were premature. Recognizing the potential for COAH to act appropriately in this field, the trial judges should have deferred further action for a reasonable period of time in the "spirit of comity." *Board of Educ. of Asbury Park v. Asbury Park Educ. Ass'n,* 145 *N.J. Super.* 495, 510 (Ch. Div. 1976). In our view the complex issues now presented in this litigation can be rationally decided only after COAH has been permitted to exercise the power which the Supreme Court in *Holmdel* recognized and the challenge to those regulations has been disposed of by this court. Thus, the trial judges should stay the subject actions until "the predicates for judicial disposition of the controversy as initially raised before [them are resolved]." *Daaleman v. Elizabethtown Gas Co.,* 150 *N.J. Super.* 78, 84 (App. Div. 1977), *rev'd on other qrounds,* 77 *N.J.* 267 (1978).

Finally, we address the question of whether Cherry Hill's mandatory development fee ordinance was improperly adopted in

that the fee was increased from one percent to three percent by resolution after the first reading of the ordinance. That issue was properly before the Law Division judge irrespective of the validity and effect of the COAH AO. *See Alexander's Dep't Stores of N.J. v. Borough of Paramus,* 125 *N.J.* 100, 112-13 (1991). The attempt to change a significant provision of the ordinance by resolution between the first and second reading renders the ordinance invalidly adopted. The substantial change required republication because of the additional burden on those affected. *See Gilman v. City of Newark,* 73 *N.J. Super.* 562 (Law Div. 1962).

However, the defect in the ordinance claimed by Cherry Hill Properties Corporation (CHP) is purely a procedural one and quite capable of detection upon passage by anyone who was affected by it. The ordinance as first published called for a one percent fee whereas the ordinance as adopted called for a three percent fee. At the time of adoption, CHP had obtained preliminary site plan approval and was in the process of obtaining final site plan approval. It cannot contend that it was unaware of the discrepancy which was a matter of public record. Such procedural deficiencies can be cured by appropriate action by the municipal governing body. It is for that reason that challenges of this nature must be presented within the time limitations provided in *R.* 4:69-6. *Trust Co. of N.J. v. Planning Bd. of the Bor. of Freehold,* 244 *N.J. Super.* 553, 560 (App. Div. 1990). Unlike the claims which undergirded the Supreme Court's decision in the *Holmdel* case, this challenge, limited as it was to a procedural defect, is neither of constitutional dimension nor of great public interest. Thus, there is no just cause to extend the forty-five day time limit permitted by the provision of *R.* 4:69-6(c). We hold that CHP's claim on this particular issue is time-barred.

Finally, CHP contends that the Cherry Hill ordinance is invalid as applied to it because it impermissibly altered the terms of

Appendix A

CHP's preliminary and final approvals. The issue was initially raised by CHP in a footnote in its brief before the trial judge. Although it was addressed by the defendant Township and again by CHP in its reply brief, the trial judge did not decide the issue. In any event, we conclude that the issue is without merit. *R.* 2:11-3(e). A builders' fee ordinance such as the one adopted by Cherry Hill is unrelated to any of the conditions over which the Cherry Hill Planning Board would have jurisdiction in granting preliminary approval.

The final judgments under review involving the Township of South Brunswick and the Township of Cherry Hill are reversed. All matters are remanded to their respective trial courts for further proceedings the nature of which must necessarily depend upon the outcome of the appeal now pending challenging the regulations passed by COAH.

I hereby certify that the foregoing is a true copy of the original on file in my office.

s/ [illegible]

Clerk

APPENDIX B — ORDER OF NEW JERSEY SUPREME COURT, FILED NOVEMBER 24, 1992

SUPREME COURT OF NEW JERSEY
C-365 September Term 1992
35,470

MORRIS INDUSTRIAL BUILDERS, INC.
Plaintiff-Petitioner,

v.

THE TOWNSHIP OF SOUTH BRUNSWICK, etc. et al.,
Defendants-Respondents.

AND OTHER RELATED MATTERS

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-6073/6080-90 and A-205/206/394/429-91 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, on this 23rd day of November, 1992.

s/ Stephen W. Townsend

CLERK OF THE SUPREME COURT

I hereby certify that the foregoing is a true copy of the original on file in my office.

s/ Stephen W. Townsend

CLERK OF THE SUPREME COURT
OF NEW JERSEY

APPENDIX C — EXCERPTS OF TRANSCRIPT OF PROCEEDINGS OF NEW JERSEY SUPERIOR COURT, LAW DIVISION, JULY 19, 1991

SUPERIOR COURT OF NEW JERSEY LAW DIVISION —
MIDDLESEX COUNTY
DOCKET NO. W-013004-89 P. W.

GREEK, ET ALS,

Plaintiff,

VS.

SOUTH BRUNSWICK, ET ALS

Defendant.

TRANSCRIPT OF PROCEEDINGS

JULY 19, 1991
MIDDLESEX COUNTY COURTHOUSE
NEW BRUNSWICK, NEW JERSEY B E F O R E

BEFORE
THE HONORABLE C. JUDSON HAMLIN, J.S.C.

APPEARANCES:
VALERIE K. BOLLHEIMER, ESQ.
ATTORNEY FOR PLAINTIFF GREEK

DAVID B. RUBIN, ESQ.
ATTORNEY FOR PLAINTIFF MORRIS

Appendix C

PAUL CATANESE, ESQ.
ATTORNEY FOR DEFENDANT SOUTH BRUNS.

GERALDINE CALLAHAN, ESQ.
ATTORNEY FOR DEFENDANT COAH.

* * *

[18] have already been dispersed to one builder but may not be dispersed to him simply because of who was advising the town at the time.

Now, your Honor when we were here earlier mentioned that because of the importance and —of land use issues politically and governmental' in South Brunswick you wouldn't necessarily hold it against the town per se that different legal positions were taken. That doesn't mean they were right or wrong, but I think that whatever happens here, that that can't be over-looked in how the Court addresses these issues.

THE COURT: Okay.

MR. RUBIN: Thank you, Judge.

THE COURT: Thank you.

Miss Callahan.

MS. CALLAHAN: Thank you, your Honor.

THE COURT: Miss Callahan, before you begin your

argument perhaps you can help me on a couple of questions I might have. As I understand it from your position, the Council is currently considering forms of regulations which they now intend to adopt sometime in the future. Is that right?

MS. CALLAHAN: Yes, your Honor.

[19] THE COURT: Okay. And I'm a little fuzzy on my administrative law but if I understand correctly I'm asking you now, first tentative drafts of regulations. Correct?

MS. CALLAHAN: Yes, your Honor. If you'd like, I could give you a little summary of how the rule —

THE COURT: And then from there you advertise and have hearings published.

MS. CALLAHAN: Correct. You don't necessarily have to have hearings. You allow the opportunity for comment.

THE COURT: Comment. Okay.

MS. CALLAHAN: And generally that is written —

THE COURT: And that is a formal adoptive process.

MS. CALLAHAN: Yes.

THE COURT: Okay. And I suppose they've been doing this since January or at least since the Holmdel case was decided.

MS. CALLAHAN: Yes, your Honor.

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THE COURT: When would you anticipate the Council would have these adopted regulations?

MS. CALLAHAN: Finally in place I would [20] guess December and —

THE COURT: Would you bet me, would you be willing to pay all your co-counsel for lunch? There's a restaurant here called La Fontana. It's very expensive.

MS. CALLAHAN: I know that one.

THE COURT: Would you be willing to buy lunch for everybody if these aren't formally adopted by December?

MS. CALLAHAN: Almost, your Honor.

THE COURT: Out of your own pocket?

MS. CALLAHAN: Almost, because —

THE COURT: Almost?

MS. CALLAHAN: I say almost because I'm fairly certain that they will be done by then because, number one, the Council already had proposed regulations, orders in June. They did not formally propose them in the New Jersey register because some policy issues needed to be ironed out, so they anticipate to have all that ironed out for the proposal to go in the register for August or September.

Then there's also a thirty day comment period. Then after that the agency can adopt the regulations.

[21] THE COURT: Do you think that this issue will be addressed very shortly before the election?

MS. CALLAHAN: Your Honor, what the Council is going to do as far as the Council is not an elective body.

THE COURT: I know that and you know that. But you are not naive enough not to understand the impact of these kinds of issues on the public and the population.

MS. CALLAHAN: Frankly, your Honor, I have not heard any mention at all either, publically —

THE COURT: Of course not. Those things are never discussed openly. They just seem to happen and after thirty or forty years in this business you tend to see it happen a couple times. It's a reality. You deal with it.

It's not significant. I was just discussing timing and what happens when the municipalities that wish to voluntarily become part of this have to adopt ordinances, do they not?

MS. CALLAHAN: Yes, your Honor.

THE COURT: Okay. And we all know how [22] fast municipalities move, do their drafting, so would guess that if everything went as quick as you think it might, somewhere in the summer of 1992 South Brunswick might have an ordinance in place that could then be — properly be challenged.

MS. CALLAHAN: I would hope it would be before then.

THE COURT: I know you would hope.

MS. CALLAHAN: I can not guess as to what would happen.

THE COURT: Okay. And of course you would agree, given the issues that are involved in the legal history, that no matter what happens there certainly would be a challenge in the Court, both to the ordinance and to the regulations again.

MS. CALLAHAN: Yes, your Honor.

THE COURT: Which probably would not be resolved until the Supreme Court resolution two years after that. So we'd be talking about holding on to this money somewhere until 1994, 1995 until the resolution of the issue.

MS. CALLAHAN: Your Honor, the money is being held in a separate interest bearing account.

[23] THE COURT: I understand that. That wasn't my question, Counsel. We can reasonably predict under your scenario at least another four years before these people even will have an opportunity under your suggestion to get their money back, if in fact they are entitled to it.

MS. CALLAHAN: Your Honor, I'm not willing to predict how long it will take.

THE COURT: Okay.

MS. CALLAHAN: I think the important thing we have to remember here is suppose the Council goes ahead and does exactly what it says going to do right now and your Honor orders the funds to be returned and those funds are returned.

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Practically speaking, since your Honor seems to like to look at the reality of things, practically speaking, the towns aren't going to get that money back. The builders are going to have the money back. The money's going to be gone.

And if the Council is upheld throughout all the various appeals that probably will take place, that money will be gone.

THE COURT: Well, that assumes that you . . . .

* * *

[45] . . . was adopted. They paid the money on that ordinance and now we really have to correct what amount to the deficiencies.

THE COURT: I compliment you on your cleverness. Go ahead. What's next?

MR. CATANESE: That's it, your Honor.

THE COURT: Okay. Thank you.

The matter before the Court presents an interesting combination of social, political, and legal concerns. When I talk about social and political I do not mean to imply that those things play a part in the conclusions that I would reach. I mean to imply them in the broadest and best sense.

It deals with public policy regarding priorities of this State and the people of this State in regards to housing, and how to deal with the provision of housing for persons who are generally decided or conceived to be unable to afford them.

Those are significant policy decisions beyond the realm of this

Court, but they nonetheless are present and only a Court of unusual obtuseness would be unaware of them.

Whether or not as a matter of social [46] policy it is better for a government to provide housing or the private sector is beyond the purview of this Court, although concededly there are significant arguments made on both sides of the issue, but it deals with an extremely significant social goal and a manner of achievement.

COAH indeed probably owes its existence to precisely that tension that exists between the executive, legislative, and the judicial branches in this regard.

I don't think it uncommon to say that indeed many of the comments in many of the articles that appeared shortly after Mount Laurel One and Two that dealt extensively with these issues raised them.

There is a substantial body of opinion which concluded that the Supreme Court acted in the void of action by the Legislature to create remedy that some would argue was beyond the purview of a judicial body.

By the same token there are others who applauded that action as being Constitutionally mandated and dealing specifically with the responsibilities to the Supreme Court. Be that [47] as it may, it was a groundbreaking and unusual action by a Court in almost any state in the union.

It necessarily caused tension between the legislative branch and the judiciary because clearly in order to carry out the mandates of Mount Laurel, clearly actions of other branches of government had to be undertaken to complete or at least carry out the process.

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Thus in the context of a public out-cry COAH was created as a way of dealing with the somewhat unwieldy efforts of the Mount Laurel Court to establish or start resolving all manner of municipal land use that would still be consistent with what may be an out-dated idea of home rule in the State.

COAH was the agency to which the Legislature and the judiciary could retreat without confrontation and try to permit a more orderly and more consistent attack on a problem at hand.

That, however, is not, of course, an abdication of the responsibilities of the judiciary in general of overseeing administrative agency to determine if they comply [48] with minimal Constitutional guaranteed standards.

Those considerations, and because those things came about in that way, are much the reason why this continues to remain a wellspring of litigation, misunderstanding, and error.

Thus many years after Mount Laurel and COAH, I have yet to see empirically reliable studies to indicate how many homeless or low income people really have been provided affordable housing.

Affordable housing may well be argued to be less expensive housing, but still not affordable to the reach of the average fifteen or seventeen thousand dollar worker in this State.

We've done things like cluster zoning. We've reduced other requirements. We've done a whole number of things. We've done this wonderful business of trading money for housing units wherein more wealthy communities are able to give money to less wealthy communities to absorb their housing obligations. That has been sanctioned, but it's an interesting development given the alleged overall social policy considerations that might be accomplished.

Appendix C

The instant case presents several issues [49] for this Court to resolve directly. Concededly Judge Stanton has reached a resolution on his cases and he has expressed his opinion. I might say Judge Stanton is a well-respected, thoughtful, reflective judge.

In our business there are some of us who are more or less able to deal with complicated issues. Certainly Judge Stanton's reputation is one as being able to deal both in sophisticated and complicated areas with competence and indeed with compassion.

Judge McGann's reputation needs no comment by me. He is a pragmatic, intelligent judge whose reputation is equally worthy in the Courts.

Having said that, their issues deal some respect in some small differences with some of the issues I have to deal with here but nonetheless reach the bottom number of the same issue and quite properly this will wind up in the Appellate Division. Whether I do it by way of order of transfer or whether I do it by way of judgment and order, it will wind up in the Appellate Division and eventually I expect the Supreme Court.

And it is not improper, given the [50] different posture of the different issues in the different counties, that it may well be, in terms of effective judicial resolution, for the Appellate Division or the Supreme Court to have before it cases in varying postures and procedural situations so they will have the opportunity rather than raise issues sua sponte, as the Attorney General points out, much to the surprise of all litigants and to the generation of further litigation, to have a broad and varied set of alternatives open to them so instead of inventing something new, that they may pick and choose something that reflects their evaluation of the situation.

Now, let's deal with one issue at a time. The first issue I think deals with the jurisdiction and the authority of this Court to deal with the case given the promulgation of the administrative order which is dated — what's the date of Mr. Griffith's order? Looks look January nineteen. Am I correct?

MS. CALLAHAN: It's twenty-eighth, your Honor.

THE COURT: Twenty-eighth.

MS. CALLAHAN: Yes.

[51] THE COURT: Okay. While these cases bear docket numbers subsequent to the original action, clearly the issues in dispute and the claim for relief has been before the Courts of this County long before this administrative order and indeed were disposed of by an order of Judge Figarotta wherein not only did he determine that the South Brunswick ordinances either were invalid or invalidly adopted, but not of legal dimension which could warrant the exaction of monies from private citizens and ordered the return of those funds.

The matter wound its way through the Courts and eventually wound up consolidated with the Supreme Court cases and resolved by the Supreme Court of the State of New Jersey. They resolved the matter from the existing facts and existing orders and existing body of law.

The only thing that they left open was the concern expressed by the Court below and that is that in terms of actual return, the industrial or professional group that had the standing to challenge the regulations were not the ones who could seek the returns and indicated that those returns would have to be sought separately.

[52] As Judge Stanton, I do not for a minute read into that the idea or the foreseeability by the Supreme Court of what subsequently happened in this action. I think in the context of the cases as they arose and the orders before them, which in this case were Judge Figarotta's orders required the money to be returned, indicated, at best, a mechanical or procedural relief by individual builders or persons who paid these exactions to determine the specificity of the nature of their claims and the exactness of the monies paid. That's all. I don't think it anticipated anything else.

What followed was a proposal by COAH for the governor's signature. It's not important why this matter was not signed or whether it was withdrawn or whatever. The bottom line is that the chief executive of this State took no action in regard to the proclamation of emergency or other conclusions or orders that might have been promulgated by him. But what's important and what's interesting is, in the letter of transmittal to Governor Florio dated January eleventh by Chuck Griffiths, the first sentence indicates I think the overriding concern that's [53] exhibited here.

Dear Governor Florio, quote, we have an immediate opportunity to retain in excess of thirty million dollars for affordable housing investments while creating construction and related jobs and income in our State, close quote. We got the money. The fact that we got this money illegally, folks, let's hold on to it.

For whatever reason, whether it was withdrawn or otherwise, it was not signed. Thereafter Mr. Griffiths promulgated on behalf of COAH the emergency administrative order which in essence presumed to direct all municipalities of the State of New Jersey who had funds on deposit pursuant to these ordinances to keep them, promising that sometime in futuro some regulation would be

promulgated which might comply with the requirements of the Supreme Court if the municipalities chose to adopt ordinances consistent with it.

As is evidenced by colloquy today, there is no clear schedule. There are some fond hopes that it will be done sometime by the end of this year and that perhaps all the public bodies will act in appropriate fashion sometime by the middle [54] of next year or perhaps a little later, which would only then for the first time, following COAH's argument, would permit the plaintiffs here to challenge the sufficiency of those ordinances and regulations in an attempt to get back the money that was concededly paid pursuant to an invalid, whether you call it an invalidly adopted or invalid in general, an ordinance which had no legal effect and under which Constitutionally is the only way a public entity, whether it be a legislature or a municipality or a county can exact from private persons monies.

There's only certain ways in a republican or a democratic society — I use those with the small letters — that governments may extract from its citizens money. That indeed is that which separates us from other forms of government.

And it is not, as I've ever understood it, in our Constitutional process permitted that monies may be held or obtained by a simple letter of an appointed public official. It frankly staggers the mind.

But be that as it may, the question here is: Does this constitute the type of regulatory [55] action which, by Appellate rule, can be asserted only before that body? This Court concludes that the answer to that is no. I conclude that the answer is no for two reasons. First, that where litigation has already begun, has been subject to judicial control and determination, indeed to disposition

by the Supreme Court of this State, under those circumstances a, quote, administrative order, close quote, not a rule promulgated consistent with the requirements of rules or regulations, is insufficient to rise to the level of a quote rule or quasi-judicial determination of an administrative agency, close quote, which gives rise to exclusive jurisdiction of the Appellate Division.

Rather I construe this letter to be precisely what it is, a stop-gap holding action, without standards. Not quasi-judicial. Not quasi-anything. And under those circumstances does not rise to that level.

I also point out that the Court, once it undertakes jurisdiction of a particular matter, may not be deprived of jurisdiction by some formal action such as a letter from Chuck Griffiths. It is simply, just because you write [56] on the letterhead of something called COAH, doesn't mean it's a rule or a quasi-judicial action.

And that's really frankly the only indicia of official action that we have is the letterhead. And I'm saying it very directly and I suppose very cruelly, but I want to frame the issue directly for the Appellate Division to give them a broad range of conclusions that they deal with. They're free to reject it, but they're also free to accept it.

So for those two reasons, A, it's already a matter of judicial determination, B, that it does not rise to the level of a ruling making it a judicial action. I'm not satisfied that the Appellate Division has exclusive jurisdiction. This Court does have jurisdiction. The motion to transfer is denied.

Now, to reach the merits of the cause, let me deal with a couple things first. Although you are not put on notice, Miss Callahan,

there was last week an application on behalf of Mr. Mezey's client for a turnover of funds.

In that regard I'm not quite sure how the Sheriff got a levy by a party not named in the [57] original litigation, but I am satisfied that given the clear statement of the Supreme Court that individual parties would have to make individual claims, that that envisages not merel obtaining a writ of execution under the original caption. It envisions a claim made upon a municipality and, failing their payment, separate litigation with a separate caption.

Under those circumstances a levy previously entered in this matter by Summerfield Suites Development Company was improvidently granted, is ineffective and shall be vacated.

If you want to get that money you have to do it by independent, separate action.

Mr. Catanese, I ask you to submit an order in that regard.

As to the issue of Summary Judgment, I'm not satisfied that any material issue of fact exists in this case. The motion to strike the late answer is denied. I am not satisfied that it — maybe it's not procedurally correct, but I don't have to reach that issue.

I will permit that issue or that answer to be filed and to be retained. But I am not satisfied that the sole issue that raises here is [58] to the entitlement or whether or not a rebate may or may not be due from Morris or any other persons is an issue which affects the claim before the Court and accordingly I am satisfied that all the other matters are concededly resolved.

The only question is the legal effect of the action of the

Supreme Court and the current litigation. It's ripe for Summary Judgment, and in this regard I observe two things. First, that the original order upon which the appeal is based not only concluded that the ordinances were improper, but ordered their return, ordered the return of fees and indeed South Brunswick undertook to return the principal fees paid in the one captioned matter and declined to pay the interest and then in others only declined to pay completely.

I'm satisfied that the effect of the lower Court order, once a disposition is made on the merits, is appropriate and effective, and was not vacated by the Court other than to indicate that individuals would have to apply for the money as opposed to the group representing all of them.

Under those circumstances I'm satisfied [59] that Summary Judgment should be granted, that the monies on deposit with the Township should be turned over.

But alternatively and further I think I have to deal with the order which has received somewhat rough handling on my part. I'm afraid I badgered Miss Callahan somewhat, not because I in any way am hostile to her. Her brief is well-thought out. She does what an adversary had to do. Did good research. Argued her position as diligently and as completely as possible.

But as I review the matter, the fatal aspect of this is that what COAH's trying to do is frankly what astonished Judge Stanton and astonished me and what we are doing here is determining that a public body which may act only within Constitutional legislatively mandated standards exacted monies from private citizens pursuant to an ordinance which had been declared illegal, thus the monies which were paid and are kept are illegal and obtained without authority.

Appendix C

What COAH now seeks to do is to now hold the money raised on the theory that money is a scarce resource and in Mr. Griffiths' letter it says analogous, he uses that word, analogous to [60] the scarce resources.

The scarce resource theory talks about things that which, in equity, we used to call irreparable things, things which cannot be replaced.

If there's one common concept in the law is that money is not irreplaceable or irreparable harm. Legal damages have always been considered something that is not quote irreparable.

Money, although it may be difficult to obtain, is not a scarce resource. I may not have it, you may not have it, but somebody's got it. It's out there.

And I think the reasoning which substantiates or which validated the earlier decisions recognizing the scarce resource order as being within the purview of COAH and within their Constitutionally mandated standards does not apply where the res we're talking about is a replenishable source.

Sure you want it. But you hold it illegally. You attempted to.

I really don't understand and I rule here as a matter of law that any regulation, even one validly adopted in futuro and validly adopted by [61] the municipality, would constitute an ex post facto rule or regulation, and you cannot now resuscitate that which was exacted illegally in the first place. Hiding the gun after the robbery doesn't make it legal.

And I so rule. There are interesting questions.

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Getting to the policy question, which is not paramount in the context of what I am doing now, the answer is that COAH governmental bureaucracy is going to better provide housing and better dispose of the thirty million dollars that was in place and that it will create some social good. And without being an advocate, I can see the other side of that coin and I'm sure all of you are intelligent enough to see the other side of that coin also. Builders are going bankrupt in the State Jersey left and right. In the long haul that is not a healthy economic development for the State. They are a resource.

Do I like builders? Do we like anybody who goes up and knocks down a farm and trees and builds up houses and shopping centers? No. I don't like that. I don't want to see that. I [62] want my state to stay the same as it is right now. But that's not the issue.

Well, we're saying yeah, we want to hold your money. Well, how long are you going to hold my money? You got my money. How long are going to hold it? A year? years? Four years maybe? Gee. I might go out of business. My employees are going to go out of business. They're going to lose their jobs.

That, that housing tract that I had options on and mortgages on, I'm not going to be able to service the mortgage.

Well, the bank's going to come in. But the value of the collateral that they gave me the money on four years ago has depreciated. Given the housing market now the bank probably doesn't even want it. And if they do want it, what are they going to do with it? The bank might have some problems because then they've got collateral that isn't going to match the loan.

Do we have any banking problems now? I think we do. The answer is nothing happens in a vacuum.

Appendix C

Sure you want it. Sure you want to build houses. But there's an effect on the other side [63] of the coin which while I can't properly concern myself with because I must properly apply the law, but you have to look at the overall housing development in the State provided by the State private developers. I think I have to look at that and that's why I get back to the fact or why, in colloquy, I talked about the fact that there may be other policy considerations which might be given rise to sometime in the future. Nothing is done in a vacuum.

We have an entirely different housing economy now than we did five years ago, ten years ago, or when Mount Laurel came down. It may well be that some of the regulations in practice have proved to be impractical, and there's no guarantee that these regulations will ever be adopted or, if so, when because the make-up of the bodies would be different, and the thrust, the policy thrust that may be put upon it may be different, which gets me back to the colloquy asked, if this order is valid that has been promulgated by Mr. Griffiths, it's valid. If it's invalid, it's invalid. If it's invalid for Constitutional standards, it's invalid for Constitutional standards. Invalidity will not [64] arise next June, next December, May of 1992, or June of 1994 if I have to judge the legality of the public action.

This thing put on the letterhead of the Council for Affordable Housing doesn't give me a Constitutional standard to do so.

Clearly even in Counsel's argument she concedes that if the regulations were not adopted over an extended period of time there would be some Constitutional deprivation.

Well, the money is being held without legal authority now and this letter doesn't give rise to, quote, legal authority, close quotes,

and under those circumstances I'm fully and completely satisfied that Summary Judgment in Greek, Timber Ponds, and Morris Industrial should be granted and is granted, and I will order the return of the funds in question.

* * *

Supreme Court, U.S.
FILED
MAR 2 4 1993

No. 92-1396

In The

Supreme Court of the United States

October Term, 1992

MORRIS INDUSTRIAL BUILDERS, INC., a New Jersey Corporation,

Petitioner,

vs.

THE TOWNSHIP OF SOUTH BRUNSWICK in the County of Middlesex, a municipal corporation of the State of New Jersey, THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF SOUTH BRUNSWICK, THE PLANNING BOARD OF THE TOWNSHIP OF SOUTH BRUNSWICK,

Respondents.

On Petition for Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

RESPONDENTS' BRIEF IN OPPOSITION

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OBJECTIONS TO JURISDICTION

1. On June 16, 1992, the Appellate Division of the Superior

Court of New Jersey decided *Frank A. Greek & Sons, Inc. v. The Township of South Brunswick*, 257 N.J. Super. 94, 607 A.2d 1359 (App. Div.), certif. denied *sub nom Morris Industrial Builders, Inc. v. The Township of South Brunswick*, 130 N.J. 602, 617 A.2d 1224 (1992). Therein the Appellate Division reversed the trial court and remanded the matter for further proceedings at the trial level, with an instruction that the nature of such proceedings would necessarily depend upon the outcome of the appeals challenging the regulations passed by the Council on Affordable Housing ("COAH") then pending in the Appellate Division.[1] The New Jersey Supreme Court's denial of Petitioner's petition for certification effectively ratified the Appellate Division's remand. Thus, Petitioner's case is still pending at the trial level and will remain so until the question of the COAH regulations is resolved. That being the status of Petitioner's case, it is not ripe for consideration by this Court.

2. Procedurally it appears that Petitioner's submission does not fall into any of the categories set forth in U.S. Sup. Ct. Rule 10, 28 U.S.C.A. (West Supp. 1992). Even if such categories are not all-

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1. Uncertainty as to the length of time it would take COAH to adopt rules and regulations was a factor in the trial court's decision. Ironically, COAH promulgated the rules and regulations within the time estimated by counsel for COAH during oral argument before the trial judge on the motion for summary judgment (*See* Petition, pp. 16-20; Petitioner's Appendix C, pp. 20a-25a). The rules and regulations were adopted in December, 1991, and effective in January, 1992. Petitioner implied, in its Statement of the Case, that the new COAH regulations automatically allow municipalities to retain the fees collected before December 13, 1990. Such is not the case. A municipality must apply to COAH for review of its previous development fee ordinance and a determination as to whether or not the municipality may retain some or all of the fees collected thereunder (N.J.A.C. 5:91-15.1, *et seq.*). December 13, 1990 is the date the New Jersey Supreme Court decided *Holmdel Builders Association v. Township of Holmdel*, 121 N.J. 550, 583 A.2d 277 (1990), which directed COAH to promulgate rules and regulations and is also the underlying decision upon which Petitioner relied to prosecute its claim for a refund of the fees paid.

inclusive, as indicated in the Rule, it must also be noted that Petitioner failed to raise any Fifth or Fourteenth Amendment claims in the courts below until the petition for certification to the New Jersey Supreme Court. At that point, Petitioner claimed that the Appellate Division failed to consider the developers' Fifth Amendment due process right to a "clear and certain remedy" for alleged improperly collected development fees. In that petition, as in this, Petitioner relied primarily on *McKesson v. Division of Alcoholic Beverages*, 496 U.S. 18 (1990), to support its claims. The petition was denied by the New Jersey Supreme Court. Petitioner should not be permitted to raise here what it failed to raise below.

3. Petitioner also raised a question of the New Jersey appellate court's "mistaken application of the choice-of-law factors of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971)." Respondents recognize that Petitioner has, at this stage, merely submitted the petition for a writ of certiorari and that a brief on the merits will follow if the petition is granted. However, aside from a brief reference to the *Chevron* case and a citation of the case which applies it to New Jersey cases, Petitioner completely failed to provide this Court with any guidance as to how it believes the Appellate Division mistakenly applied the law or how this "mistake" relates to Fifth and Fourteenth Amendment claims.

4. Finally, the entire affordable housing issue in the State of New Jersey, from the original decision in *Southern Burlington County NAACP v. Mt. Laurel Township*, 67 N.J. 151, 336 A.2d 713, *cert. denied*, 423 U.S. 808 (1975), through the decision under consideration here, has always been a matter of state constitutional law. The New Jersey Supreme Court found that municipalities have an obligation under the New Jersey State Constitution to provide a realistic opportunity for affordable housing. The decisions regarding the mandate to provide such housing, methods of implementation, codification through the Fair Housing Act

("FHA"),[2] and the appropriateness of development fees as a part of the solution to the pressing need for affordable housing in New Jersey, have all been determined on state constitutional grounds. The State courts are the appropriate interpreters of the State Constitution and, therefore, this matter should not be before this Court. Where certiorari has been sought in past affordable housing decisions, this Court has denied the writ; so, too, is denial appropriate in this case.

STATEMENT OF THE CASE

To avoid repetition of Petitioner's presentation, Respondents merely offer the following additions to the Statement of the Case as set forth in the petition at p. 3, *et seq.*

1. Before Respondent Township of South Brunswick adopted its affordable housing trust fund (development fees) ordinance in 1986, it had submitted to and received the approval of COAH for the housing plan element of its zoning ordinance. This submission was in accordance with the rules and regulations promulgated by COAH pursuant to the FHA. That housing plan element identified certain tracts of undeveloped land within the Township of South Brunswick which would be suitable for inclusionary developments (*i.e.* those which manditorily included affordable housing units) and yet fit into the master plan for the Township. The zoning ordinance provided that developers of those tracts could be given certain compensations, such as density bonuses, for including a specific percentage of low to moderate income housing within the development. It was not until after the entire plan was in place that the Township determined that the plan, while imposing substantial burdens on those developers who chose to develop the inclusionary parcels, still would not be sufficient to meet the Township's future needs for affordable housing as set by COAH from time to time.

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2. N.J.S.A. 52:27D-301, *et seq.*

It was only then that the Township looked to those other developers who benefited from the utilization of the Township's most finite resource — land — *i.e.* the developers of non-inclusionary residential tracts and commercial/industrial tracts, for their contribution to the municipality's housing obligation. The FHA specifically provides that municipalities do not have to expend municipal revenues to provide affordable housing, N.J.S.A. 52:27D-311d. In *Holmdel Builders Association, supra*, 121 N.J. at 573-74, the New Jersey Supreme Court interpreted this provision of the FHA to mean that the Legislature had determined that affordable housing does not have to be provided directly by local governments and that local governments are, therefore, impliedly authorized to use inclusionary-zoning devices such as mandatory development fees to generate affordable housing. The Court found that development fees applied to non-inclusionary developers are the functional equivalent of the mandatory set-asides imposed on inclusionary developers. *Id.* at 576. Contrary to Petitioner's implication, the Township is not relying solely upon funds generated by development fees to meet the affordable housing mandate imposed upon it by the New Jersey Constitution; indeed, a substantial portion of that obligation is being met by those developers who are actually including affordable housing units in their residential developments.

2. Petitioner claimed, in n.1 of the petition, that the only procedure for challenging the development fees was "expensive and protracted" litigation. In the paragraph following the footnote reference, Petitioner described that very litigation, which was undertaken by several builders' associations. Petitioner was a direct beneficiary of that litigation (without having borne the expense of it) in that the New Jersey Supreme Court, in *Holmdel Builders Association, supra,* indicated that individual developers could seek refunds of the fees previously paid.

Petitioner also claimed that the Court did not address the

taking and due process issues raised by the builders' associations. In *Holmdel Builders Association, supra*, 121 N.J. at 558, the Court defined the issues it would address:

> This appeal raises two major substantive issues. One is whether there is statutory authority, derived from the FHA, the Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-1 to -129, and the general police power of government, N.J.S.A. 40:48-2, that enables a municipality to impose affordable-housing development fees as a condition for development approval. That issue raises the related questions whether the development-fee ordinances constitute an impermissible taking of property or violate substantive due process or equal protection. The second major issue is whether affordable-housing development fees are an unconstitutional form of taxation. Finally, if these ordinances are invalid, the appeal presents the issue whether a trade organization has standing to seek a refund on behalf of its members.

After determining that the imposition of development fees was permitted by the FHA, MLUL and general police powers, the Court did examine the related constitutional claims. The Court determined that because the plaintiffs therein did not allege that they were members of a suspect class, the alleged violations of due process and equal protection could be resolved by reference to the validity of the development fees as reasonable exercises of statutory zoning and police powers. *Id.* at 581. The Court also stated that, "As long as the measures promulgated are not confiscatory and do not result in an inadequate return of investment, there would be no constitutional injury." *Id.* at 582.

Finally, the Court determined that the fees were a form of inclusionary zoning and similar to other land-use and related exactions and thus were regulatory measures, not taxes. *Id.* at 585.

REASONS FOR DENYING THE WRIT

"It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 96 S. Ct. 2882, 49 L. Ed. 2d 752 (1976). *See also, Ferguson v. Skrupka*, 372 U.S. 726, 83 S. Ct. 1028, 10 L. Ed. 2d 93 (1963); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 75 S. Ct. 461, 99 L. Ed. 563 (1955). However, retroactive legislation does have to meet a burden not faced by legislation that has only future effects. The retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former. *Usery v. Turner Elkhorn Mining Co., supra*, 428 U.S. at 16-17, 96 S. Ct. at 2892-2893. But that burden can be met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose. *Pension Benefit Guaranty Corporation v. R.A. Gray & Company*, 467 U.S. 717, 730, 104 S. Ct. 2709, 2718, 81 L. Ed. 2d 601 (1984).

Under New Jersey case law the burden which a party must bear to show that a legislative action violates due process or equal protection is substantial. He must show that there is no reasonable basis for the action, it serves no legitimate legislative purpose and cannot be justified under any conceivable state of facts. *Drop v. Belleville*, 192 N.J. Super. 236, 469 A.2d 934 (App. Div. 1983). Alternatively, to defend an enactment, the legislative body need only show that the distinctions drawn further an appropriate government interest and are not arbitrary. *Shepard v. Woodland*

Township Committee and Planning Board, 71 N.J. 230, 364 A.2d 1005 (1976).

The government interest here is obvious, provision of low income housing pursuant to the municipality's obligation under the New Jersey State Constitution to do so. The basis for imposing the development fee only on new non-inclusionary development is equally clear. The *Mount Laurel* decisions[3] require municipalities to regulate land development in such a way as to ensure that lower income housing needs are met. The New Jersey Supreme Court has held that municipalities are constitutionally obligated to exercise their zoning powers in such a way that new development will include a regional fair share of affordable housing. Developers of inclusionary sites are mandated by the Township's zoning ordinance to do their share. The development fee ordinance allows the municipality to obtain funds from non-inclusionary developers to offset, in part, the increased need for affordable housing created by such development, an increased need which is part of the total affordable housing need in the Township. Moreover, whether development fees are utilized to satisfy an indigenous housing need or the need created by the new development, a development fee ordinance bears a real and substantial relationship to a legitimate government interest and imposes the fee on a fair and rational basis.

The New Jersey Supreme Court, in *Holmdel Builders Association, supra*, at 579-80, deferred to COAH to specify, through its rulemaking procedures, standards for development fees, "so that municipalities may consider employing such fees as inclusionary-zoning devices in designing their housing elements under the FHA. Regulatory standards will enable us to determine

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3. *Southern Burlington County NAACP v. Mt. Laurel Township, supra, (Mt. Laurel I)*, and *Southern Burlington County NAACP v. Mt. Laurel Township*, 92 N.J. 158, 456 A.2d 390 (1983) (*Mt. Laurel II*).

that persons subject to such ordinances have been reasonably informed of their obligations, and that both municipalities and COAH in the adoption and approval of such ordinances are acting in conformity with the legislative intent of the FHA." After describing some of the areas which it expected COAH to include in the regulations, the Court said, at 580:

> COAH, in the exercise of sound administrative discretion, should consider the desireability and feasibility of such development fees in the broader context of the State's affordable housing policy. Development fees can be a valuable alternative that some municipalities desire to employ in fulfilling their *Mt. Laurel* obligations. Moreover, such fees should be considered constituent parts of local housing elements designed to meet municipal affordable-housing obligations under the FHA. Thus, COAH's regulatory responsibility in this area must be acknowledged. Accordingly, we anticipate that COAH will properly discharge this responsibility by promulgating appropriate development-fee regulations.

At that point the Court determined that in the absence of such regulations, the ordinances at issue in the case had to be set aside and further agreed that the individual developers who had paid fees under the ordinances could seek refunds. Some five and a half months later Petitioner instituted this litigation seeking a refund of development fees.

The Appellate Division, in the well-reasoned *Greek* decision, *supra,* stated that "It is important to reiterate that the ordinances in question were authorized by statute, *i.e.*, the MLUL, the general police power, and the FHA. Thus, they were not *ultra vires* acts by

the municipalities. *The distinction is important."* (Emphasis added) (Petitioner's Appendix A, at 13a). The Appellate Division was careful to limit its holding to the issue of COAH's "potential power" to adopt regulations and did not pass upon the acceptability of the content of the regulations.[4] It also set forth in substantial detail the means by which legislation which was improperly enacted, but is not unconstitutional or *ultra vires,* can be ratified or cured (Petitioner's Appendix A, pp. 13a-15a). In a challenge to the retroactive application of a statute or regulation, a critical question is how the challenger's conduct, or the conduct of others in its class, would have differed if the rule in issue had applied from the start. *Daughters of Miriam Center For The Aged v. Mathews,* 590 F.2d 1250, 1262 (3rd Cir. 1978), *citing to Usery v. Turner Elkhorn Mining Co., supra.*

> Retroactive measures — whether promulgated by a legislature or by an administrative agency — have traditionally been subjected to stricter scrutiny than have prospective measures. Thus, . . . the validity of a prospective regulation by an administrative agency "will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.' " [*Mourning v. Family Publications Service, Inc.,* 411 U.S. 356, 93 S.Ct. 1652, 36 L.Ed.2d 318 (1973)] In contrast, "courts have generally compared the public interest in the retroactive rule with the private interests that are overturned by it" in deciding whether to uphold a retroactive promulgation. [*Adams Nursing Home of Williamstown, Inc. v. Mathews,* 548 F.2d 1077 (1st Cir. 1977); *SEC v. Chenery Corp.* 332 U.S. 194, 67 S.Ct. 1575, 91 L.Ed. 1995 (1947)] Such

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4. As previously set forth in n.1, the content of the regulations is the subject of litigation currently pending in the Appellate Division.

> disparate treatment is justified because retroactive laws interfere with the legally-induced and settled expectations of private parties to a greater extent than do prospective enactments. Still, retroactive rules designed to cure defects in regulatory schemes . . . are often sustained because the "interest in the retroactive curing of such a defect in the administration of government outweighs the individual's interest in benefiting from the defect." [Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation,* 73 Harv.L.Rev. 692, 705-06 (1960)] *Daughters of Miriam Center For The Aged, supra,* at 1259-60.

Petitioner has made no claim whatsoever that it or anyone else would have acted differently if the ordinance had been validly adopted from the outset. Indeed, non-inclusionary developers paid the fees, developed their properties, and now want the fees back. If the Township is compelled to refund all or some of the fees before the validity of the content of the regulations and the retention of fees collected under prior ordinances is resolved in the state courts, there will be no way for the Township to recoup the funds. Land which has been developed will not generate additional development fees. If the monies are returned before a final determination as to the retroactivity of the ordinance, substantial resources which could be used to further the mandated housing goals would be lost, with no guarantee that a comparable opportunity will ever again exist for the collection of such funds. As a result, there is a strong public interest in the proper retention of those funds. Moreover, it has been acknowledged by some non-inclusionary developers who paid the fees that the costs were passed on to subsequent purchasers/tenants as a cost of business. To the extent that such is the case, there is only a limited private

interest in the return of these funds — indeed, they would be a windfall to the developers. Therefore, any action by this Court, other than denial of the writ, would be premature at this point.

Finally, Petitioner relied on *McKesson v. Division of Alcoholic Beverages, supra,* to support its claim to a due process right to a "clear and certain remedy" for alleged improperly collected development fees. In that case Florida enacted a tax scheme whereby a party had to pay his taxes in full before there could be a challenge to the tax's validity; failure to pay would result in penalties. This Court found that where a tax is declared unconstitutional, the state must provide a remedy for the erroneous or unlawful taxation. Thus *McKesson* deals with a situation where a state has collected an unconstitutional tax. In the instant matter the development fees are neither taxes nor unconstitutional. *Holmdel Builders Association, supra,* 121 N.J. at 582-585. Respondents assert that *McKesson* is inapposite here.

CONCLUSION

Where Petitioner has (1) raised an issue which is not ripe for consideration by this Court; (2) failed to raise the constitutional issue claimed in the petition at the state trial and appellate levels; (3) raised a constitutional issue as to a matter which has been developed solely through court decisions based on the State Constitution; and (4) failed to present this Court with adequate factual or legal reasons for review of the court decision below, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 92-1396

In The

Supreme Court of the United States

October Term, 1992

MORRIS INDUSTRIAL BUILDERS, INC., a New Jersey Corporation,

Petitioner,

vs.

THE TOWNSHIP OF SOUTH BRUNSWICK in the County of Middlesex, a municipal corporation of the State of New Jersey, THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF SOUTH BRUNSWICK, THE PLANNING BOARD OF THE TOWNSHIP OF SOUTH BRUNSWICK,

Respondents.

On Petition for Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF IN OPPOSITION FOR RESPONDENT NEW JERSEY COUNCIL ON AFFORDABLE HOUSING

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QUESTION PRESENTED

Whether *McKesson v. Division of Alcoholic Beverages*, 496 U.S. 18 (1990) applies where fees collected pursuant to a municipal ordinance to be used to satisfy a State constitutional obligation to provide low and moderate income housing are not taxes and the scheme under which the fees were collected is not unconstitutional or otherwise illegal.

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Respondents.

On Petition for Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

In two landmark decisions, the Supreme Court of New Jersey declared that each municipality in the State has a unique and important obligation under New Jersey's constitution to provide a

realistic opportunity for its fair share of lower income housing. N.J. Const. (1947), Art. I, ¶1; Art. IV, § 6, ¶2; *So. Burl. City, N.A.A.C.P. v. Tp. of Mt. Laurel*, 67 N.J. 151, 174, 336 A.2d 713, *cert. denied*, 423 U.S. 808 (1975); *So. Burl. Cty. N.A.A.C.P. v. Mt. Laurel Tp.*, 92 N.J. 158, 208-09, 456 A.2d 390 (1983). In response to the so-called *Mt. Laurel* decisions, the State Legislature enacted the Fair Housing Act (the Act), N.J.S.A. 52:27D-301 *et seq.*, to provide a comprehensive mechanism to address in an orderly and meaningful way the constitutional duty of all local communities. *See* N.J.S.A. 52:27D-303.

Among its many regulatory features, the Act created a State agency known as the Council on Affordable Housing (the Council) and gave it wide-ranging administrative powers to define regional needs throughout New Jersey for low and moderate income housing, to establish guidelines for municipalities to determine their fair share of the region's needs and to decide if proposed ordinances and related planning steps will satisfy local needs. *Hills Dev. Co. v. Bernards Tp.*, 103 N.J. 1, 21-23, 510 A.2d 621, 632-33 (1986). Under the Act, a municipality is required to submit to the Council a "housing element," which is an analysis of the measures it plans to take to address its lower income housing obligation, and a "fair share plan," the township's proposed ordinances designed to actually carry out its planning steps. N.J.S.A. 52:27D-309(a); N.J.A.C. 5:91-4.2. Pursuant to the Act, a municipality ". . . may provide for its fair share of low and moderate income housing by means of any technique or combination of techniques which provide a realistic opportunity for the provision of the fair share." N.J.S.A. 52:27D-311(a). Based on its submissions, a community may petition the Council for "substantive certification" which, if granted, constitutes approval of the plan to satisfy the municipality's *Mt. Laurel* obligation. N.J.S.A. 52:27D-313.

In response to the constitutional obligation to provide affordable housing as codified in the Act, several municipalities

adopted ordinances requiring owners of new development to pay to the municipalities a fee which the municipalities would use for lower income housing. The method for imposing the fee varied from municipality to municipality, but, generally, the fee imposed was based on the size of the project. *See Holmdel Builders Ass'n v. Township of Holmdel*, 121 N.J. 550, 558-62, 583 A.2d 277, 281-83 (1990). Several builders associations filed suit against a number of municipalities, including South Brunswick Township, challenging these municipal development fee ordinances, claiming that the ordinances exceeded municipal authority under the zoning and police powers and the Act; were illegal taxes; constituted an uncompensated taking and were a denial of due process and equal protection. In *Holmdel Builders Ass'n v. Township of Holmdel, supra*, the New Jersey Supreme Court rejected these arguments. The Court found that a municipality has the statutory authority under the Act to impose by ordinance mandatory fees on development to be used for affordable housing. The Court also concluded that, since the Act created the Council and vested it with primary jurisdiction over satisfaction of the municipal fair share housing need, the Council, in the first instance, should adopt regulations to govern imposition of development fees. Because the Council had not yet promulgated regulations governing mandatory development fees, the Court ruled that the ordinances at issue were not validly adopted. The New Jersey Supreme Court also specifically declared that development fees did not constitute a tax, but rather were legitimate regulatory measures designed to provide a realistic opportunity for provision of the municipality's lower income housing need.

In response to *Holmdel Builders Assn'n*, on January 28, 1991, the Council issued an Administrative Order directing municipalities that had collected fees prior to *Holmdel Builders Ass'n* to hold those monies in a separate, interest bearing escrow account pending promulgation of regulations. The Order was intended to preserve the *status quo* until the Council could follow the New Jersey Supreme Court's directive and promulgate regulations governing mandatory development fee ordinances.

Meanwhile, a number of developers instituted lawsuits against six municipalities claiming that they were entitled to a refund of the fees paid. In all cases, the developers argued that *Holmdel Builders Ass'n* mandated refunds. The developers relied heavily on language in the opinion that rejected one builders association's attempt to sue for refunds on behalf of its constituents. The New Jersey Supreme Court rejected the claim on standing grounds ". . . without prejudice to the right of individual members to seek refunds in separate actions." *Holmdel Builders Ass'n v. Township of Holmdel, supra*, 121 N.J. at 586, 583 A.2d at 295. The developers also relied on the New Jersey Supreme Court's finding that the ordinances were not validly adopted due to lack of Council regulations. Each municipality sued raised the Council's Administrative Order as a defense to its failure to give refunds and the Council sought and was granted leave to intervene in all cases.

Petitioner, Morris Industrial Builders, Inc., as well as several other developers, filed suit against South Brunswick Township seeking refunds of the development fees they had paid under South Brunswick's mandatory development fee ordinance. All plaintiffs, including Petitioner, moved for summary judgment, arguing that *Holmdel Builders Ass'n* entitled them to refunds of fees paid under the ordinances as a matter of law and that the Council had no authority to adopt regulations that would enable municipalities to keep fees collected under ordinances adopted before promulgation of Council regulations. The Council filed a cross-motion for summary judgment arguing that *Holmdel Builders Ass'n* did not mandate refunds and that the Council could adopt regulations allowing municipalities to retain fees already collected. Neither Petitioner nor the other developers raised any federal due process issues during the course of the hearings before the trial court. Petitioner did state in its complaint that South Brunswick's actions in continuing to hold the development fee collected from Petitioner "violates the plaintiffs' constitutional due process rights and

plaintiffs' property rights," however, petitioner never raised any arguments concerning this allegation in its summary judgment motion or in response to the Council's cross-motion.

In the South Brunswick cases, by Order dated July 30, 1991, the trial court granted the developers' Motions for Summary Judgment finding that *Holmdel Builders Ass'n* required a refund and denied the Council's motion. In ordering refunds, the trial court concluded that the Council could not promulgate regulations that would allow municipalities to keep the previously collected fees. The trial courts in the cases involving other municipalities issued similar rulings.

The Council appealed those cases in which the trial courts' decisions constituted a final judgment and was granted leave to appeal in those cases where the trial courts' Orders were interlocutory. Meanwhile, on January 21, 1992, while the Council's appeals from the refund Orders were pending, the Council adopted regulations governing development fees. N.J.A.C. 5:91-15.1 *et seq.*; 5:92-18.1 *et seq.* These regulations include procedures for retaining previously collected fees. N.J.A.C. 5:91-15.1 *et seq.* Three developers filed timely appeals from these regulations which are now pending before the New Jersey Appellate Division.

The Appellate Division ruled on the Council's appeals from the trial courts' refund Orders in *Frank A. Greek v. South Brunswick Tp.*, 257 N.J. Super. 94, 607 A.2d 1359 (App. Div. 1992), *certif. denied*, 130 N.J. 602, 617 A.2d 1223 (1992). The New Jersey Appellate Division found that *Holmdel Builders Ass'n* did not mandate refunds. Rather, the court found that the Supreme Court did not decide the issue. The Appellate Division then concluded that the Council has the "potential power to promulgate regulations upon which the defendant municipalities may rely to validate prior action on their part in collecting mandatory builders'

fees." *Id.* at 101, 1362. Relying on well-established law, the Appellate Division found that the municipalities can validate ordinances since the municipalities were not acting *ultra vires*. The Appellate Division stressed in its opinion that it was deciding only the limited issue of the Council's potential power to pass curative regulations and the municipalities potential power to validate their prior actions. Since the Council had expressed to the trial courts its intention to adopt regulations, the Appellate Division concluded that the trial courts should have deferred to the Council for a reasonable period pending completion of the rule promulgation process and, accordingly, reversed the Orders requiring refunds.

Petitioner, as well as several other developers, petitioned the New Jersey Supreme Court for discretionary review of *Frank A. Greek*. The parties argued that the New Jersey Supreme Court should hear the cases because the Appellate Division had interpreted the New Jersey Supreme Court's decision in *Holmdel Builders Ass'n* wrongly and because the Appellate Division had misapplied the well-settled law governing validation of prior municipal actions. Petitioner also argued, for the first time in the long history of these cases, that the failure to award refunds violated federal due process standards as set forth in *McKesson v. Division of Alcoholic Beverages*, 496 U.S. 18 (1990). The New Jersey Supreme Court denied the various petitions for certification without comment on November 24, 1992. *Frank A. Greek v. South Brunswick Tp., supra*. Petitioner filed a petition for writ of certiorari with this Court on February 22, 1993. Respondent received the petition on February 23, 1993.

SUMMARY OF ARGUMENT

1. Petitioner failed to raise federal due process arguments at either the trial or Appellate Division levels, despite having ample opportunity to do so and the Appellate Division decision does not discuss any federal due process issues. Petitioner first raised

McKesson and the due process issue when it petitioned the New Jersey Supreme Court for certification. New Jersey appellate courts do not address issues not properly raised at the trial level. *Nieder v. Royal Indemnity Co.*, 62 N.J. 229, 234, 300 A.2d 142, 145 (1973). The United States Supreme Court generally will not review a final judgment of a State court where the claim was not presented in the States courts. *Bd. of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 550 (1987). Petitioner's failure to properly raise these claims, therefore, should preclude its petition.

2. This petition should be denied because the matter is not finally resolved by the New Jersey courts. In *Frank A. Greek v. South Brunswick Tp., supra,* the New Jersey Appellate Division decided only the limited issue of the Council's power to promulgate regulations that may allow municipalities to validate their previously adopted development fee ordinances, thereby allowing the municipalities to retain the fees collected or a portion thereof. As the Appellate Division noted, the substance of the regulations and municipal conduct in response to the regulations is a separate matter. An appeals from the regulations are now pending before the New Jersey Appellate Division. It is these regulations that set forth the procedures that may allow municipalities to retain previously collected fees or, conversely, will result in refunds to the developers. Since Petitioner's requested relief is a refund, it seems premature at this time to consider this case when the very regulations that may result in some refund still are on appeal in the State courts.

3. Contrary to Petitioner's assertions, *McKesson* has no applicability whatsoever to this case. *McKesson* states that due process requires the State to afford taxpayers a meaningful opportunity to secure post-payment relief for taxes already paid pursuant to a tax scheme ultimately found unconstitutional. In this case, there is no tax involved nor is there any payment scheme involved that has been found to be unconstitutional or otherwise

illegal. The New Jersey Supreme Court specifically declared that development fees are not taxes. *Holmdel Builders Ass'n v. Township of Holmdel*, 121 N.J. at 585, 583 A.2d at 294. Moreover, the New Jersey Appellate Division found that the Council possesses the statutory authority to promulgate regulations to allow municipalities to retain previously collected fees and that municipalities may validate the invalidly adopted ordinances pursuant to Council regulations. *Frank A. Greek v. South Brunswick Tp., supra*. These conclusions were reached solely on the basis of State law. Without some scheme of illegal taxation present, *McKesson* provides no basis for granting the petition.

4. Even assuming *arguendo* that *McKesson* is not limited to taxes and applies to any monies collected by a governmental entity, *McKesson* still does not apply to this case. The underlying premise of *McKesson* is that the government must provide a mechanism to refund citizens' monies when those monies have been collected illegally. In this case, no court has found that the municipalities involved have collected fees illegally. The New Jersey courts have found that development fees are authorized under the Act and that the Council may adopt regulations that allow municipalities to retain previously collected fees. Unlike *McKesson*, this is not a situation where the government's collection of monies is unconstitutional or illegal.

REASONS FOR DENYING THE WRIT

There are no special and important reasons why this Court should review the New Jersey Appellate Division's decision in *Frank A. Greek*. Sup. Ct. R. 10. Petitioner did not raise the federal law questions which it now urges this Court to consider at either the State trial or Appellate Division levels. Indeed, the opinion from which Petitioner seeks review does not even discuss any of the issues Petitioner now raises. Petitioner, therefore, should not be permitted now to premise the basis for this court's jurisdiction on

such arguments. Additionally, contrary to Petitioner's assertions, no federal due process issues as discussed in *McKesson* are at issue in this case. *Frank A. Greek v. South Brunswick Tp., supra,* the case from which Petitioner seeks review, is just one case in an ongoing series of cases addressing the permitted use of development fees as a technique to provide for the municipal fair share lower income housing need as required under New Jersey law. This is not a situation where a party has paid an unconstitutional tax and the State is refusing to refund the taxes wrongly collected. Thus, the post-deprivation remedy and attendant due process considerations as discussed in *McKesson* do not apply.

Initially, this Court should deny the petition because Petitioner never properly raised the federal law issues in the State courts and the New Jersey courts therefore have not had the opportunity to review the federal due process issues Petitioner raises. Petitioner did not raise any federal due process claims at either the trial court or Appellate Division level.[1] Petitioner certainly had ample opportunity to do so, especially since it was Petitioner's Motion for Summary Judgment, which the trial court granted, that was the subject of *Frank A. Greek.* Petitioner's arguments both before the trial court and Appellate Division were premised on State law. Consequently, there is no discussion of any federal due process considerations in *Frank A. Greek.* It was not until Petitioner sought discretionary review of *Frank A. Greek* from the New Jersey Supreme Court that it even raised *McKesson* and federal due process arguments. The New Jersey Supreme Court denied the petition without explanation, not surprisingly

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1. Petitioner did allege in its complaint that the failure of South Brunswick to refund its money constituted a deprivation of its due process rights. Petitioner, however, never pressed this claim. The mere mention of a federal right without full briefing and argument is an insufficient basis on which to premise Supreme Court jurisdiction. *Bankers Life & Cas. Co. v. Crenshaw,* 486 U.S. 76, 77-78 (1988).

thereby refusing to address the newly raised federal issues since New Jersey appellate courts will not consider issues which have not been raised in the trial courts. *Nieder v. Royal Indemnity Co., supra,* 62 N.J. at 234, 300 A.2d at 145.

Likewise, this Court will not review a State court decision unless the record demonstrates that the federal claim was adequately presented in the State system. *Bd. of Directors of Rotary Int'l v. Rotary Club,* 481 U.S. 537 (1987). The absolute silence of the Appellate Division's decision aptly demonstrates that federal issues were not raised before it. *Exxon Corp. v. Eagerton,* 462 U.S. 176, 181 n.3 (1983) (failure of highest State court to pass upon federal question leads to assumption that federal issues were not properly presented in State courts). Under these circumstances, this Court should deny the petition.

Moreover, the New Jersey courts have not finally resolved the matter of imposition of development fees and possible refunds. The purpose of Petitioner's petition as set forth therein is to secure a refund of the development fees it has paid to South Brunswick Township. Petitioner may very well secure some refund. The Council has promulgated regulations which set forth standards and procedures for municipal retention of development fees collected under previously adopted ordinances. N.J.A.C. 5:91-15.1 *et seq.* and N.J.A.C. 5:92-18.1 *et seq.* It is entirely likely, indeed probable, under the regulations, that Petitioner will receive some refund. Those regulations, however, are the subject of pending appeals. As a result of these appeals, the amount of a refund that Petitioner may be entitled to is unsettled. Under these circumstances, it is premature for the Court to consider the petition at this time. This is especially so since the Appellate Division in *Frank A. Greek* specifically limited its decision to the narrow issue of whether the Council has the "potential power" to adopt regulations that allow municipalities to validate previously adopted ordinances thereby resulting in the retention of fees collected. *Frank A. Greek v. South Brunswick Tp., supra,* 257 N.J. Super. at 106, 607 A.2d at 1365.

The petition also should be denied because Petitioner does not present any legitimate federal claim. Petitioner's reliance on *McKesson* in support of its claim that it is entitled to a refund is totally misplaced. In *McKesson*, Florida enacted a liquor excise tax scheme to give preference to alcoholic beverages manufactured from certain products grown in the State. McKesson, which had been paying the taxes, challenged the preferential tax treatment. The Florida court invalidated the tax scheme as violative of the Commerce Clause of the United States Constitution and enjoined future enforcement of the scheme, but declined to order refunds or any other form of relief for previously paid taxes. This Court reversed the Florida court finding:

> When a State penalizes taxpayers for failure to remit their taxes in a timely fashion, thus requiring them to pay first before obtaining review of the tax's validity, federal due process principles long recognized by our cases require the State's post-deprivation procedure to provide a "clear and certain" remedy [cite omitted] for the deprivation of tax moneys in an unconstitutional manner. [*McKesson v. Division of Alcoholic Beverages, supra,* 496 U.S. at 51].

McKesson does not state that a refund is the required remedy. Rather, *McKesson* provides that "[t]he State is free to choose which form of relief it will provide, so long as the relief satisfies the minimum federal requirements we have outlined." *Ibid.* *McKesson* requires the State to afford taxpayers a meaningful opportunity to secure post-payment relief for taxes paid pursuant to a tax scheme found to be unconstitutional.

McKesson is readily distinguishable from the present case for two significant reasons. First, here there is no tax involved. The

New Jersey Supreme Court unequivocally has declared that development fees are not taxes. Rather, the fees are the equivalent of mandatory set asides,[2] another technique already approved by the New Jersey Supreme Court for providing lower income housing. *Holmdel Builders Ass'n, supra,* 121 N.J. at 582-85, 583 A.2d at 293-94. *McKesson* specifically involved taxes and the discussion and decision dealt with an unconstitutional tax scheme. *McKesson,* therefore, is inapplicable.

Even assuming, however, that *McKesson* is not limited to taxes and applies to any type of governmentally compelled fee, *McKesson* still is inapplicable because the fees charged here are not unconstitutional. Indeed, quite the contrary exists here. The New Jersey courts have specifically upheld such fees and the Council's ability to promulgate regulations governing previously collected fees. Thus, not only is the fee not unconstitutional, it has not been found to be illegal in any way.

In *Holmdel Builders Ass'n, supra,* the New Jersey Supreme Court ruled that the State Fair Housing Act authorizes municipalities to impose development fees as a technique for municipal provision of its fair share of lower income housing. The Court further found that, since the State Legislature had vested the Council with primary jurisdiction of municipal satisfaction of the fair share need, the Council, in the first instance should promulgate regulations addressing development fees. In *Frank A. Greek, supra,* the Appellate Division addressed the issue of the Council's authority to adopt regulations that may allow municipalities to

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2. "Set aside means the percentage of housing units devoted to low and moderate income households within an inclusionary development." N.J.A.C. 5:92-1.3. A mandatory set aside is when a municiality by zoning ordinance requires a developer to include a certain percentage of low and moderate income units in a development in order to help satisfy the municipality's *Mt. Laurel* housing obligation.

keep previously collected fees, finding that the Council has such authority. The Appellate Division also ruled that, in accordance with well established State law, municipalities can take action to validate prior development fee ordinances since those ordinances were not *ultra vires*, as explained in *Holmdel Builders Ass'n*. The Appellate Division in *Frank A. Greek* was careful to note that it was deciding only the very limited issues of the Council's "potential power" to pass curative regulations and municipalities' potential power to validate prior ordinances. *Frank A. Greek v. South Brunswick Tp., supra*, 257 N.J. at 106, 607 A.2d at 1365. The substance of the regulations themselves, and thus the actual procedures for retaining fees, presently is the subject of pending appeals before the New Jersey Appellate Division.

The *Holmdel Builders Ass'n* and *Frank A. Greek* cases discussed above demonstrate that development fees for affordable housing are legal. They also demonstrate that the Council has the power to promulgate regulations that may allow municipalities to keep some or all of the fees collected. This is a far cry from the situation in *McKesson* where the State court concluded that the tax scheme in Florida was flatly unconstitutional. Here, the fees are legal and the methods for imposing fees and allowing towns to keep monies already collected still is under judicial review. Moreover, unlike *McKesson* where there was no mechanism for a refund of the illegally imposed taxes, here the Council has adopted regulations that may result in refunds in those instances where the municipality has collected too much money under the Council's standards. N.J.A.C. 5:91-15.1. Given these significant differences, *McKesson* has no applicability whatsoever to the present case and thus cannot provide a basis for granting the petition.

Although not specifically stated in its petition, it appears to be Petitioner's position that the development fees in question are illegal because the New Jersey Supreme Court in *Holmdel Builders Ass'n* felt constrained to declare the ordinances "not validly

adopted" because of lack of Council regulations governing the fees. *Holmdel Builders Ass'n v. Township of Holmdel, supra,* 121 N.J. at 580, 585, 583 A.2d at 292, 295. Petitioner seems to assume that because the municipal ordinances under which the fees were collected were "not validly adopted," the fees are totally illegal and therefore it is entitled to a refund under *McKesson.* As the New Jersey Supreme Court found in *Holmdel Builder Ass'n* and as the Appellate Division explained in *Frank A. Greek,* invalidation on procedural grounds is something that can be cured because the municipal power to adopt the ordinances has existed all along. This is not a situation, as in *McKesson,* were a tax was imposed in violation of the law and therefore the authority to collect the monies was entirely lacking. Petitioner's leap of logic in this case is entirely inconsistent with *McKesson* and provides no basis for granting the petition. *Parker v. McLain,* 237 U.S. 469 (1915) (federal question which rests on obviously false assumption is so plainly devoid of merit as to afford no basis for the exercise of jurisdiction).

Petitioner also mentions briefly without explanation that somehow the New Jersey Supreme Court mistakenly applied *Chevron Oil Co. v. Huson,* 404 U.S. 77 (1971). This argument seems to be wrapped up in Petitioner's arguments that *McKesson* should apply here and therefore it appears really to be an extension of its *McKesson* arguments. For the reasons cited above, *McKesson* has no applicability to this case. In any event, neither the New Jersey Supreme Court nor the Appellate Division cited *Chevron Oil Co.* The Appellate Division in *Frank A. Greek,* citing New Jersey law, did state that issues concerning disruption of governmental policies and other equitable considerations are to be considered when determining whether a law is to be applied retroactively. While the Court in *Frank A. Greek* does discuss retroactive application of laws, it was not the law on retroactivity that was the focus of the court's decision. The Appellate Division found that since New Jersey law allows a municipality to cure an

imperfectly taken action which was within the municipality's authority, it is appropriate for an administrative agency such as the Council to exercise its rulemaking authority and allow municipalities to cure municipal action that was not void *ab initio*. This decision does not implicate *Chevron Oil Co.* in any way.

In conclusion, there is absolutely no basis on which to grant the petition in this case. *Frank A. Greek* involves a matter that is unique to New Jersey, namely municipal satisfaction of a State constitutional obligation to provide lower income housing. The New Jersey Supreme Court has found that development fees are authorized under New Jersey statutes as a method to meet this obligation. Petitioner's last minute attempt to inject federal due process issues into these lengthy proceedings is entirely inappropriate. Moreover, its federal due process arguments relying on *McKesson* have no merit. Under these circumstances, this Court should deny the petition.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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